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State Bystander Responsibility

Monica Hakimi*

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Abstract

International human rights law requires states to protect people from abuses committed by third parties. Decision-makers widely agree that states have such obligations, but no framework exists for identifying when states have them or what they require. The practice is to varying degrees splintered, inconsistent, and conceptually confused. This article presents a generalized framework to fill that void. The article argues that whether a state must protect someone from third-party harm depends on the state's relationship with the third party and on the kind of harm caused. A duty-holding state must take reasonable measures to restrain the abuser. That framework is grounded in international law and intended to guide decisions in concrete cases. So after presenting and justifying the framework, the article applies it to two current debates in human rights law: when must a state protect against third-party harms committed outside its territory? And what must states do to protect women from private acts of violence? The article ends by suggesting how the same framework may inform analogous obligations outside human rights law.

1 Introduction

International human rights law has historically focused on proscribing governmental abuse. States must not torture, detain or kill arbitrarily, discriminate on the basis of race or sex, and so on.[1] Those proscriptions are critical to the human rights regime, but they confront two significant limitations. First, states commit abuses – sometimes, truly monstrous ones – even though they are obligated not to. Second, states are not the only abusers. Proscriptions targeting governmental abuse do not cover the many abuses committed by, for example, private individuals, corporations, armed gangs, and intergovernmental organizations.

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[1] See International Covenant on Civil and Political Rights, GA Res 2200A, UN GAOR, 21st Sess., Arts 2(1), 6–7, and 9, UN Doc A/RES/2200 (16 Dec. 1966), 999 UNTS 172 (entered into force 23 Mar. 1976) (hereinafter ICCPR).

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Human rights law increasingly addresses those limitations by assigning states obligations to protect. Obligations to protect require states to restrain third parties from committing abuse. The third party in this scenario may be another state, or it may be some other kind of actor. The critical point is that the duty-holding state need not participate in the abuse in order to have an obligation to protect.

Obligations to protect are not new to international law or particular to human rights law.[2] But they are now claimed, prescribed, and applied in varied human rights contexts:

- Even before the development of modern human rights law, the law on the protection of aliens required states to protect foreign nationals from physical injury caused by private actors.[3] Though that obligation was not understood in terms of the aliens' rights, it required states to protect aliens from third-party harm.[4]
- Several human rights and criminal law treaties obligate states to protect persons from abuses committed by private actors.[5] States acknowledge that they have such obligations,[6] and treaty bodies apply and enforce them.[7]

[2] See *infra* sect. 5.C.

[3] For detailed discussions, see F.V. García-Amador, Louis B. Sohn, and R.R. Baxter, *Recent Codification of the Law of State Responsibility for Injuries to Aliens* (1974), at 28; C.F. Amerasinghe, *State Responsibility for Injuries to Aliens* (1967).

[4] Historically, states have debated whether the law on the protection of aliens establishes an obligation to protect or an obligation of national treatment. The dominant view is that it establishes an obligation to protect: A state must protect foreign nationals in its territory consistently with an international minimum standard, no matter how it treats its own nationals; see Borchard, 'The "Minimum Standard" of the Treatment of Aliens', 33 *Am Soc Int'l L Proceedings* (1939) 51, at 53 and 56–60; Pisillo-Mazzeschi, 'The Due Diligence Rule and the Nature of the International Responsibility of States', 35 *German Yrbk Int'l L* (1992) 9, at 41–44. Today, that debate is largely moot, because human rights law establishes more protective international standards that apply to all persons in the state's territory.

[5] See, e.g., Convention on the Elimination of all Forms of Discrimination against Women, Art. 2(e), GA Res 34/180, UN GAOR Supp., 46th Sess., UN Doc A/34/180 (entered into force 3 Sept. 1981) (hereinafter CEDAW); International Convention on the Elimination of All Forms of Racial Discrimination, Arts 2(d) and 5(b), 4 Jan. 1969, 660 UNTS (1969) 195 (hereinafter CERD); Convention on the Rights of the Child, Art. 19(1), GA Res 44/25 annex, UN GAOR, 49th Sess., UN Doc A/44/49 (entered into force 2 Sept. 1990) (hereinafter CRC); International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Art. 16(2), GA Res 45/158, annex, 45 UN GAOR Supp. (No. 49A) at 262, UN Doc A/45/49 (entered into force 1 July 2003) (hereinafter CRMW); Convention on the Rights of Persons with Disabilities, Arts 4(e) and 16, 46 ILM (2007) 443 (entered into force 3 May 2008) (hereinafter CRPD); Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, 23 Sept. 1971, 24 UST (1973) 564, 974 UNTS (1975) 177 (hereinafter Convention on Aircraft Sabotage); International Convention for the Suppression of Terrorist Bombings, 17 Dec. 1997, 37 ILM (1998) 249, 2149 UNTS (2001) 256 (hereinafter Terrorist Bombing Convention). I treat the criminal law treaties as human rights treaties, because they require states to protect against specific, rights-violating conduct.

[6] See, e.g., *Albán-Cornejo v. Ecuador* [2007] Inter-Am. Ct HR (ser. C) No 171 (22 Nov. 2007), at para. 11; Committee on the Elimination of Discrimination against Women, *Communication No. 2/200: A.T. v. Hungary*, UN Doc CEDAW/C/32/D/2003 (2005), at paras 5.6–5.10; Human Rights Committee, *Initial Report: Honduras*, UN Doc CCPR/C/HND/2005/1 (2005) (hereinafter Honduras ICCPR Report), at paras 45–53; Committee on the Elimination of Discrimination against Women, *Combined Initial, Second and Third Periodic Report: Tajikistan*, UN Doc CEDAW/C/TJK/1-3 (2005) (hereinafter Tajikistan CEDAW Report), at 7–9.

[7] See, e.g., the sources cited at *infra* note 182. I use the phrase 'treaty bodies' to refer to the organs established under the universal human rights treaties and to the courts and other institutions established under regional treaties.

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- *Non-refoulement* is a well-established obligation to protect. The state must take action – that is, not return someone to his home country – in order to protect the person from abuse by that country.[8] A state that deports someone, despite the risk of abuse, typically is not responsible for participating in the abuse.[9] Rather, the deporting state is responsible for failing to protect the person from third-party harm.
- The International Court of Justice has determined that states must protect against acts of genocide committed by or in another state.[10] Similarly, the court has determined that states must protect against conduct by another state that violates the right to self-determination.[11]
- States, UN organs, NGOs, and legal scholars now endorse a concept that they term the 'Responsibility to Protect'. The concept advances two specific propositions: (1) each state must protect its own population from war crimes and mass atrocities; and (2) if one state fails, that obligation shifts to the international community as a whole.[12]

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[8] See, e.g., Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Art. 3, GA Res 39/46, UN GAOR, 51st Sess., UN Doc A/39/51 (entered into force 26 June 1987) (hereinafter CAT) (obligation where risk of torture); Convention Relating to the Status of Refugees, Art. 33, 28 July 1951, 19 UST (1968) 6259, 189 UNTS (1954) 137 (obligation where life or freedom threatened by virtue of membership of a protected group); App. No. 13284/04, *Bader v. Sweden,* ECtHR (2005-XI), at paras 41–48 (implicit obligation in limited rights); Human Rights Committee, *General Comment 31*, UN Doc CCPR/C/21/Rev.1/Add.13 (2004) (hereinafter ICCPR General Comment 31), at para. 8 (same). The obligation sometimes also applies where the prospective abuser in the home country is a non-state actor: see, e.g., App. No. 24573/94, *HLR v. France*, 26 EHRR (1998) 29, at paras 40–42; but see, e.g., Committee against Torture, *Communication No. 138/1999: MPS v. Australia*, UN Doc CAT/C/28/D/138/1999 (30 Apr. 2002), at 111, para. 7.4.

[9] See *infra* sect. 4.A.3.

[10] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia v. Serbia)* (Judgment of 26 Feb. 2007), available at: http://www.icj-cij.org/docket/files/91/13685.pdf (hereinafter *Genocide Case*), at paras 429–430.

[11] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* Advisory Opinion [2004] ICJ Rep 136 (hereinafter *Israeli Wall Case)*, at 200, para. 159.

[12] See, e.g., SC Res 1674, UN Doc S/RES/1674 (2006), at para. 4; UN GA, *2005 World Summit Outcome*, GA Res 60/1, UN Doc A/60/L.1 (2005), at para. 138 (state support); UN Secretary General, *Implementing the Responsibility to Protect*, UN Doc A/63/677 (2009), at 8–9 (UN Secretary-General support); International Coalition for the Responsibility to Protect, available at: www.responsibilitytoprotect.org (last visited 25 Mar. 2010) (NGO support); A.J. Bellamy, *Responsibility to Protect* (2009) (academic support); but see G. Evans, *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and for All* (2008), at 55 (noting 'continuing resistance' to the concept). For the foundational document that develops this concept, see International Commission on Intervention and State Sovereignty, *The Responsibility to Protect* (2001) (hereinafter R2P Commission Report), available at: www.iciss.ca/report-en.asp. The phrase 'Responsibility to Protect' causes some confusion. First, 'responsibility' is used to suggest a 'duty', thus confusing the traditional distinction in international law between an obligation (or duty) and the responsibility (or accountability) for its violation. Second, the phrase is ambiguous on whether any duty is intended to be a legal (or only a moral) duty.

- The International Law Commission has proposed making states responsible in some circumstances where they delegate authority to an intergovernmental organization that then violates rights.[13] Under that proposal a delegating state would be responsible even where the abuse was attributable only to the organization.

Though the practice on the obligation to protect is extensive,[14] it also is disjointed. International actors prescribe and apply the obligation,[15] and legal scholars examine it, piecemeal and in discrete contexts. For example, Nicola Jägers has assessed the obligation to protect people from abuses committed by corporations.[16] Andrew Clapham and Alastair Mowbray have analysed the obligation under each article of the European Convention on Human Rights.[17] Rebecca Cook has considered the obligation to protect women.[18] And Gareth Evans and Alex Bellamy have examined the obligation to protect against mass atrocities.[19]

That piecemeal approach helps define the obligation in select, discrete contexts. But it inadequately guides decisions in all of the multifarious scenarios involving a bystander state. No generalized framework exists for appraising when a state must protect against third-party harm or what that obligation requires.[20] Decision-makers

[13] International Law Commission, *Report on Its Sixty-First Session*, UN GAOR, 64th Sess., Supp. No. 10, UN Doc A/64/10 (2009) (hereinafter 2009 ILC Report), at 163–166.

[14] The practice in this area includes not only the conduct and statements of states, but also the decisions and pronouncements of various international organs. For a justification of this approach, see A. Boyle and C. Chinkin, *The Making of International Law* (2007), at 154–162.

[15] See *infra* sect. 3.A.

[16] N. Jägers, *Corporate Human Rights Obligations: In Search of Accountability* (2002), at 137–174.

[17] A. Clapham, *Human Rights Obligations of Nonstate Actors* (2006), at 349–419; A.R. Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (2004); see also C. Dröge, *Positive Verpflichtungen der Staaten in der Europäischen Menschenrechtskonvention* (2003).

[18] Cook, 'State Responsibility for Violations of Women's Human Rights', 7 *Harvard Human Rts J* (1994) 125.

[19] Evans, *supra* note 12; Bellamy, *supra* note 12.

[20] No single framework exists even in the context in which the law is most developed—where the abuser is a private actor. In this context, decision-makers often but do not always invoke the framework articulated in *Velásquez Rodríguez v. Honduras*, Inter-Am. Ct. HR (ser. C) No. 4 (1988), at para. 172, under which states must exercise due diligence to prevent, investigate, and punish any private conduct that intrudes on human rights. Contrast, e.g., ICCPR General Comment 31, *supra* note 8, at para. 8 (adopting that framework) with, e.g., App. No. 24699/94, *VgT v. Switzerland*, ECtHR (2001-VI), at paras 45–46 (declining to adopt a single framework for all private abuses). The *Velásquez Rodríguez* framework is inadequate to govern all permutations of the obligation to protect. See, e.g., Commission on Human Rights, *Integration of the Human Rights of Women and the Gender Perspective: Violence against Women*, UN Doc E/CN.4/2006/61 (prepared by Yakin Ertürk) (2006) (hereinafter Ertürk Report), at 6 ('There remains a lack of clarity concerning [the] scope and content [of the *Velásquez Rodríguez* standard]'). For example, it provides minimal guidance where abuses are imminent or widespread, or where they cannot be addressed effectively through the criminal process. A few legal scholars have sought to theorize the obligation; their proposals have been initiatory and limited to the specific context of private abuses: see A. Clapham, *Human Rights in the Private Sphere* (1993), at 343–356; Hessbruegge, 'Human Rights Violations Arising from Conduct of Nonstate Actors', 11 *Buffalo Human Rts L Rev* (2005) 21. Similar questions to the ones posed in the text arise in domestic law. In domestic law, the focus has been on whether constitutional protections apply horizontally (i.e., between private actors) and whether individuals have duties to rescue. See, e.g., Brinktrine, 'The Horizontal Effect of Human Rights in German Constitutional

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answer those questions *ad hoc*, often overlooking relevant precedents or failing to consider all of the interests at stake. Not surprisingly, their practice is at times misguided,[21] inconsistent,[22] or conceptually confused.[23]

This article addresses that problem by presenting a generalized framework on state bystander responsibility – on when states are responsible for failing to protect people from third-party harm.[24] The framework is interpretive in that it explains most of the existing practice. Surveying the practice across different contexts and legal sources (both treaty and customary), the framework extracts the common principles that animate obligations to protect and articulates how those principles apply in concrete cases. Because the practice is disjointed, however, the framework is not purely interpretive. It also constructs a vision of where the practice should go. In short, the framework seeks to nudge the practice in a particular direction, as indicated by the dominant trends.[25] The goal of this article is to help decision-makers (e.g., states, courts, treaty bodies, UN organs, and NGOs) assess whether, in any particular case, a bystander state is and should be responsible.

Some readers may be sceptical of this project. They may argue that obligations to protect are not amenable to any generalized framework because such obligations necessarily depend on the specific source of law.[26] The objection assumes either that the sources are static and have already been established, or that different sources prescribe wholly incomparable obligations. Neither assumption holds. Decision-makers continuously prescribe the obligation in new legal sources or by reinterpreting existing ones. This framework is intended to guide those prescriptive and interpretive decisions. To be effective, the framework must account for existing expectations, but it need not assume that those expectations are static. Many sources are now understood

Law: The British Debate on Horizontality and the Possible Role Model of the German Doctrine of *mittelbare Drittwirkung der Grundrechte*', 4 *European Human Rts L Rev* (2001) 421; Murphy, 'Beneficence, Law and Liberty: The Case of Required Rescue', 89 *Georgetown LJ* (2001) 605. Yet those domestic analogues are not entirely on point. A domestic system may circumscribe its constitutional protections, so as to require state action, but then establish horizontal protections in other legal sources (e.g., tort). From an international perspective, it does not matter whether the protections are constitutionally mandated, or established legislatively or judicially. On domestic duties to rescue, see *infra* note 86.

[21] See, e.g., *infra* notes 113–117, 127–130, 257–261, and accompanying texts.

[22] See *infra*, sect. 3.B.

[23] See *infra*, sect. 3.C.

[24] Of course, not every state that fails to satisfy an obligation to protect will be *held* responsible for its omission. Like other human rights obligations, obligations to protect are erratically and sometimes ineffectively enforced. Nevertheless, they are enforced with sufficient frequency (at least in some contexts) to sustain expectations that they are legally operative – i.e., that they sometimes govern behaviour and are not entirely aspirational. This article identifies *when* obligations to protect are and should be legally operative.

[25] The framework is, roughly, an exercise in constructive interpretation: see R. Dworkin, *Law's Empire* (1986), at 52.

[26] For practice supporting that position, see *infra* note 45 and accompanying text.

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to establish the obligation, even though they once were not.[27] Further, as this article demonstrates, common principles inform the obligation across contexts. Identifying those principles does not deny that the obligation applies differently depending on the specific circumstances of each case. Rather, it guides decision-makers in light of that variation, by focussing them on the considerations that underlie state bystander responsibility, regardless of context.

2 Obligations to Protect

A *As State Obligations*

Human rights law typically identifies rights separately from prescribing what states must do to help realize rights. The foundational instrument of the modern regime – the Universal Declaration of Human Rights – recognizes that '[e]veryone has the right[s] to life, liberty and security of person', and to adequate 'food, clothing, housing and medical care'.[28] The Declaration was not intended to bind states so did not prescribe state obligations. Yet it did shape expectations on the content of universal rights. The rights as formulated in the Declaration now appear in the two principal human rights treaties: the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social, and Cultural Rights (ICESCR).[29] The ICCPR and ICESCR *are* intended to bind states and do prescribe state obligations. But they define those obligations separately from the recognized rights and with language that is, for one reason or another, ambiguous.[30]

In his influential book, *Basic Rights*, Henry Shue argued for further specifying the obligations associated with human rights.[31] Shue contested the view, then dominant in the human rights literature, that every right grounds a single, correlative obligation. He argued that the same ICCPR or ICESCR right might ground multiple

[27] Contrast *Genocide Case*, *supra* note 10, at para. 427 (interpreting extraterritorial obligation into Genocide Convention) with Milanović, 'State Responsibility for Genocide', 17 *EJIL* (2006) 553, at 570–571 ('It would be extreme to argue that states have assumed an obligation to [protect] outside their territories . . . and there is absolutely no state practice to support such a contention') and W.A. Schabas, *Genocide in International Law* (2000), at 447–453 and 491–502 (concluding the same); and contrast ICCPR General Comment 31, *supra* note 8, at para. 8 (interpreting obligations to protect into ICCPR) and M. Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (2nd edn, 2005), at 39–40 (asserting that ICCPR establishes such obligations) with Burgenthal, 'To Respect and to Ensure: State Obligations and Permissible Derogations', in L. Henkin (ed.), *The International Bill of Rights: The Covenant on Civil and Political Rights* (1981), at 72, 77 (acknowledging the ambiguity on whether ICCPR establishes such obligations).

[28] GA Res 217A, UN GAOR, 3rd. Sess., 1st plen. mtg., UN Doc A/810 (12 Dec. 1948), Arts 3 and 25.

[29] ICCPR, *supra* note 1; International Covenant on Economic, Social and Cultural Rights, GA Res 2200A, UN GAOR, 21st Sess., UN Doc A/6316 (16 Dec. 1966), 993 UNTS (1976) 3 (entered into force 3 Jan. 1976) (hereinafter ICESCR).

[30] See *infra* notes 57–61 and accompanying text.

[31] H. Shue, *Basic Rights* (2nd edn, 1996), at 52. The first edition was published in 1980.

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obligations. And he identified three: obligations to respect, protect, and fulfil.[32] Obligations to respect are paradigmatic obligations not to violate rights. Obligations to protect require states to restrain third parties from violating rights. Both of those obligations preserve negative freedoms – freedoms from abuse. They differ, however, in that obligations to protect are assigned to actors that do not necessarily participate in the abuse. Finally, obligations to fulfil require states to foster positive liberties. Unlike obligations to respect and protect, obligations to fulfil assume no particular abuser.

Shue's typology helped inform what states must do under the human rights treaties. Consider, for example, the ICCPR right to life.[33] That right unquestionably grounds an obligation not to kill people arbitrarily (obligation to respect). Shue demonstrated that, based on the same right, states might have to restrain third parties from killing (obligation to protect). They might even have to provide people with access to emergency medical care (obligation to fulfil).[34] Similarly, the ICESCR right to food had been understood to require states to try to make food more widely available (obligation to fulfil).[35] Under Shue's approach, states might have to refrain from forcibly depriving persons of food (obligation to respect), and to prevent third parties from doing the same (obligation to protect). To be sure, Shue's obligations could easily be phrased as new rights: the obligation to respect the right to food might be rephrased as the right not to be forcibly deprived of food by the state. But the right to food had already been conceptualized and codified in more general terms. Shue was influential because he presented a vision for developing human rights law consistently with its own conceptual and textual foundations.

B *As Compared with the Alternatives*

The idea that states have obligations to protect is not novel or radical. Political theorists have long cited such obligations to justify the state's very existence: states exist, at least in part, to protect their populations from harm and to enforce the law against those who may intrude on individual liberties.[36] In international law, obligations to

[32] *Ibid.* Shue refers to these obligations as obligations to avoid, protect, and aid. The respect, protect, and fulfill language is conceptually the same and now dominates the human rights literature. Other legal scholars have expanded on Shue's typology or developed slightly differing ones. See M. Sepúlveda, *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights* (2003), at 157–247. This article does not advocate one typology over another. Rather, it helps define a particular kind of obligation – namely, the obligation to protect people from third-party harm.

[33] ICCPR, *supra* note 1, Art. 6.

[34] *Cf. Samity v. State of W.B.* (1996) 4 SCC 37 (India) (finding that the right to life grounds the obligation to provide emergency medical care).

[35] See ICESCR, *supra* note 29, Art. 11 (listing measures to help fulfil the right to food).

[36] See, e.g., T. Hobbes, *Leviathan* (ed. R. Tuck, 1991), at 153; J. Locke, *Second Treatise on Civil Government* (ed. P. Laslett, 3rd edn, 1988), §§ 7–13, 123–130; R. Nozick, *Anarchy, State and Utopia* (1974), at 25; M. Walzer, *Thinking Politically* (2007), at 251–262; see also Heyman, 'The First Duty of Government: Protection, Liberty and the Fourteenth Amendment', 41 *Duke LJ* (1991) 507 (reviewing political theories). The idea has new energy in international practice, because various actors now underscore that state sovereignty – historically invoked to shield states from human rights criticism – is instead a justification

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protect are part of a broader trend. The trend seeks to suppress human rights abuses by expanding the associated, international responsibility. A state that has but does not satisfy its obligation to protect is internationally responsible. Other options for expanding the responsibility associated with human rights abuses also exist.

One option is to assign more actors obligations to respect. Of course, states already have extensive obligations to respect under human rights law. Intergovernmental organizations probably do, as well.[37] But private actors generally do not.[38] Except for a handful of obligations under international criminal law, international law typically assumes that private actors are best restrained under domestic law.[39] When international law addresses private abuses, it usually requires *states* to address such abuses.[40] In other words, it assigns states obligations to protect. Yet because states are not always capable of or interested in suppressing private misconduct, some have argued for assigning more obligations directly to private actors.[41]

Even if obligations to respect were assigned more broadly, they would not substitute for obligations to protect. International actors respond differently to their human rights obligations and have varying levels of tolerance for the costs of non-compliance. A particular company may comply with an obligation to respect better than a state satisfies its obligation to protect. But other companies may violate their obligations to respect, just as states or intergovernmental organizations may. Obligations to protect address *that* problem: states must enforce human rights norms against third parties that do not or cannot be expected to restrain themselves.[42]

A second option for expanding the responsibility associated with human rights abuses is to attribute to states a greater share of such abuses. Because states have obligations to respect, attributing abuses to a state means rendering the state

for assigning states limited obligations to protect: see, e.g., *R2P Commission Report*, *supra* note 12, at 13; High-Level Panel on Threats, Challenges, & Changes, *A More Secure World: Our Shared Responsibility*, UN Doc A/59/565 (2004), at paras 29–30; see also Ignatieff, 'Intervention and State Failure', 49 *Dissent* (2002) 114, at 119 ('state sovereignty, instead of being the enemy of human rights, has to be seen as their basic precondition').

37 See, e.g., Méegret and Hoffmann, 'The UN as Human Rights Violator? Some Reflections on the United Nations Changing Human Rights Responsibility', 25 *Human Rts Q.* (2003) 314, at 316–318.

38 On the absence of corporate obligations, see Ratner, 'Business', in D. Bodansky *et al.* (eds), *The Oxford Handbook of International Environmental Law* (2007), at 808, 811. On the limited criminal prescriptions governing individual conduct, see S.R. Ratner *et al.*, *Accountability for Human Rights Atrocities in International Law* (3d edn, 2009). On the obligations that international law assigns private actors, see Knox, 'Horizontal Human Rights Law', 102 *AJIL* (2008) 1.

39 *Ibid.*, at 30.

40 This approach harnesses states' domestic capabilities and sidesteps some of the practical constraints inherent in international regulation: *ibid.*, at 19–30.

41 See, e.g., Sub-Commission on the Promotion and Protection of Human Rights, Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, UN Doc E/CN.4/Sub.2/2003/12/Rev.2 (2003); Ratner, 'Business', *supra* note 38 (reviewing practice on and arguments for assigning corporations obligations to respect).

42 Shue, *supra* note 31, at 61.

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responsible. Under the rules on state responsibility, conduct generally is attributable to a state when committed by state agents.[43] The rules identify who is a state agent. Some have argued that those rules should be interpreted more expansively, so that a broader range of actors affiliated with the state are state agents.[44] That approach overlaps with the obligation to protect because it, too, requires states to enforce human rights norms against actors that traditionally have not been considered state agents. But the attribution approach targets a narrower range of abusers. Some abusers will not be sufficiently connected to any state for their conduct to be attributable to a state. A state must address their conduct, if at all, because the state has an obligation to protect.

3 The Disjointed Practice

A *Splintering*

Even the cursory review in this article's Introduction demonstrates that obligations to protect have become prevalent in human rights law. But the practice is heavily splintered. Decision-makers do not conceptualize the obligation in general terms. Instead, they tend to disaggregate the obligation based on varied but overlapping criteria.

Sometimes, they define the obligation by reference to a specific source of law.[45] They specify the obligation under one treaty or customary rule, without assessing analogous obligations in other legal sources. Other times, decision-makers define the obligation in terms of the kind of actor committing the abuse. They claim that states must protect against all abuses committed by private actors,[46] and they assume that

[43] See International Law Commission, *Report on the Work of its Fifty-third Session*, UN GAOR, 56th Sess., Supp. No. 10, UN Doc A/56/10 (2001), at 38, available at: http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf (hereinafter Articles on State Responsibility). A state need not be the primary abuser for misconduct to be attributable to it. One state's responsibility may flow from another state's misconduct if the first state directs, controls, or assists the other state in committing the misconduct. See *ibid.*, Arts 16–18. The same rule probably applies where the primary abuser is instead an intergovernmental organization. See 2009 ILC Report, *supra* note 13, at 37–38; International Law Commission, *Fourth Report on Responsibility of International Organizations*, Addendum (prepared by Giorgio Gaja), UN Doc A/CN.4/564/Add.1 (2006), at paras 60–63. In these cases, the abuse is attributable to the directing or assisting state and that state is responsible, because its own agents participate in the misconduct.

[44] See, e.g., Case IT-94-1, *Prosecutor v. Tadic*, 38 ILM (1999) 1518, at paras 115–131 (adopting a standard of overall control); Cassese, 'The *Nicaragua* and *Tadic* Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia', 18 *EJIL* (2007) 649 (advocating for that standard).

[45] See, e.g., *Genocide Case*, *supra* note 10, at para. 429 ('The content of the duty to prevent varies from one instrument to another, according to the wording of the relevant provisions, and depending on the nature of the acts to be prevented'). The design of the human rights treaty system encourages this source-specific approach. Each of the 9 core universal treaties and 3 regional ones has a body charged with interpreting only its foundational text. Distinct texts contain similar obligations, but the obligations are often formulated slightly differently and have varying scopes of application: See, e.g., the sources cited at *supra* note 8 (varied obligations of *non-refoulement*).

[46] See the sources cited at *infra* note 68.

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no similar obligations exist where the abuser is another state[47] or an intergovernmental organization.[48] Still other times, decision-makers define the obligation based on the specific act of abuse.[49] The obligation to address mass atrocities is understood to be wholly distinct from the obligation to address more routine acts of violence.[50] Finally, decision-makers sometimes define the obligation based on the identity of the rights holder.[51] The obligation depends on whom the abuse victimizes.

None of those criteria alone determines whether a state has the obligation.[52] So decision-makers who define it by reference to only one or the other inevitably are misinformed. When assessing state bystander responsibility, they fail to consider relevant precedents or all of the interests at stake.

B *Inconsistency*

The practice on the obligation to protect is also inconsistent. Indeed, inconsistencies persist even in the context in which the law is most developed – where the abuser is a private actor. Here is one important example: the human rights treaty bodies regularly assert that states must protect against *any* private conduct that intrudes on human rights.[53] Substantial other practice disagrees.

First, states have not prescribed the obligation uniformly for all private conduct that intrudes on human rights. Rather, they have prescribed it unevenly, displaying differing levels of commitment depending on the specific context.[54] Some treaties expressly establish the obligation and define it precisely. Most criminal law treaties fall in that camp. States must protect against the proscribed misconduct by extraditing or criminally investigating suspected offenders.[55] Other treaties expressly establish the obligation

[47] But cf. Gaja, 'Do States Have a Duty to Ensure Compliance with Obligations *Erga Omnes* by Other States?', in M. Ragazzi (ed.), *International Responsibility Today: Essays in Memory of Oscar Schachter* (2005), at 31, questioning that assumption.

[48] But cf. Brownlie, 'The Responsibility of States for the Acts of International Organizations', in *ibid.*, at 355, 357, questioning that assumption.

[49] For example, criminal law treaties require states to address only abuses which constitute proscribed offences: See, e.g., Convention on Aircraft Sabotage, *supra* note 5. Likewise, the texts of many human rights treaties require states to address only particular kinds of abuse (e.g., acts of violence or discrimination): see, e.g., CERD, *supra* note 5, Art. 2; CRMW, *supra* note 5, Art. 16(2). And the obligation of *non-refoulement* applies only to some, especially egregious, abuses: see *supra* note 8 and *infra* note 165, and accompanying texts.

[50] See, e.g., *Genocide Case*, *supra* note 10, at para. 429 (specifying obligation for genocide, without considering its analogues); *supra* note 12 (same for mass atrocities).

[51] E.g., the law on the protection of aliens requires states to protect only aliens: see *supra* notes 3–4 and accompanying text. Most human rights treaties that expressly establish obligations to protect cover only persons belonging to specific groups: see *infra* notes 173–180 and accompanying text.

[52] See *infra* sect. 4.

[53] See, e.g., the sources cited at *infra* note 68.

[54] On the point that states deliberately draft treaties that reflect their desired level of commitment, see Abbott and Snidal, 'Hard and Soft Law in International Governance', in J.L. Goldstein *et al.* (eds), *Legalization and World Politics* (2001), at 37, 39; Reisman, 'The Concept and Functions of Soft Law in International Politics', in E.G. Bello and B.A. Ajibola (eds), *Essays in Honor of Judge Taslim Olawale Elias* (1992), at 135, 136–138.

[55] See, e.g., Convention on Aircraft Sabotage, *supra* note 5; Terrorism Bombing Convention, *supra* note 5.

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but then define it amorphously. Human rights treaties commonly require states to take 'appropriate' measures to protect people from abuse.[56] Because such treaties do not define what measures are appropriate, they accord a state some discretion to select its own measures, and they limit the extent to which compliance may meaningfully be assessed. Still other treaties are ambiguous on whether they even establish the obligation. The ICCPR requires states to 'ensure' all of the specified rights.[57] That language has been interpreted to establish obligations to protect.[58] But the language is ambiguous[59] and probably was not drafted with such obligations in mind.[60] Further, even if the ICCPR establishes obligations to protect, it does not define those obligations. The ICESCR confronts similar problems.[61] The ambiguity in the ICCPR and ICESCR is significant because those treaties set out a broad range of rights that everyone is understood to have. Treaties with clearer, more defined commitments limit the obligation to specific rights or rights holders.[62]

Second, states occasionally take conflicting positions on whether the obligation applies in a particular context. Human rights treaties are widely perceived to be in part aspirational,[63] but no shared rules exist for identifying which provisions are legally

[56] See, e.g., CEDAW, *supra* note 5, Art. 6; CERD, *supra* note 5, Art. 2(d); CRC, *supra* note 5, Art. 19(1).

[57] ICCPR, *supra* note 1, Art. 2(1).

[58] See ICCPR General Comment 31, *supra* note 8, at para. 8; see also *Velásquez Rodríguez*, *supra* note 20, at para. 166 (interpreting the obligation to 'ensure' in the American Convention on Human Rights); App No. 8978/80, *X and Y v. Netherlands*, 91 ECtHR (ser. A) (1985), at para. 23 (interpreting the obligation to 'secure' in the European Convention on Human Rights).

[59] The ICCPR defines most rights in general terms, without identifying which actor(s) must protect or help realize the rights. The provisions setting out those rights thus are ambiguous on whether the rights have horizontal effect – that is, whether the rights apply to private conduct. Separately, the ICCPR obligates states 'to respect and to ensure' the specified rights: *supra* note 1, Art. 2(1). If the rights do not have horizontal effect, then the obligation to ensure them is not necessarily an obligation to protect. Manfred Nowak has suggested that the ICCPR may otherwise establish obligations to protect: Nowak, *supra* note 27, at 39–40. Specifically, Nowak points to ICCPR text requiring states to provide for remedies, 'notwithstanding that the violation has been committed by persons acting in an official capacity', ICCPR, *supra* note 1, Art. 2(3)(a). According to Nowak, that language indicates that states must provide a remedy no matter who intrudes on the right. An alternative interpretation – one consistent with the general rules on state responsibility (see Articles on State Responsibility, *supra* note 43, Art. 7) – is that the 'notwithstanding' clause requires states to provide for remedies, even when the official committing the violation acts *ultra vires*.

[60] See Burgenthal, *supra* note 27, at 77 (asserting that 'the *travaux préparatoires* are not explicit', but that the language '*may perhaps* require the state to adopt laws and other measures against private interference') (emphasis added); Orentlicher, 'Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime', 100 *Yale LJ* (1991) 2537, at 2569–2570 (explaining that the ICCPR drafters appear not to have seriously contemplated obligations to protect).

[61] ICESCR, *supra* note 29, Art. 2(1) (requiring states to 'take steps' to help realize the rights); M. Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development* (1995), at 112 (discussing the drafting history and concluding that the drafters did not seriously contemplate obligations to protect).

[62] See *infra* notes 171–180 and accompanying text.

[63] See, e.g., Danner and Martinez, 'Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law', 93 *California L Rev* (2005) 75, at 89.

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operative and which reflect mere aspirations.[64] Some states ratify treaties that contain obligation-to-protect text but then systematically disregard that text and otherwise indicate that they understand the text to be legally inoperative.[65] That tendency has been particularly pronounced for obligations to protect women. The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) requires states to protect women from private acts of discrimination.[66] Many states parties have indicated that, as applied to them, the obligation is at best marginally operative.[67]

Third, the treaty bodies do not apply the obligation consistently with their own expansive claims. Treaty bodies commonly claim that the obligation attaches to every right on which private actors might intrude.[68] But that claim appears in contexts in which it has little practical effect. For instance, treaty bodies advance that claim in interpretive comments that are not binding on states and do not apply the obligation to particular facts.[69] Likewise, treaty bodies make that claim as dicta in decisions that are more narrowly tailored.[70] In fact, treaty bodies apply the obligation almost exclusively to a particular subset of abuses. Section 4.B.1 of this article describes that practice in more detail. The point here is that the treaty bodies' expansive claims are inconsistent with substantial other practice, including the practice of the treaty bodies themselves.

[64] See Hakimi, 'Secondary Human Rights Law', 34 *Yale J Int'l L* (2009) 596, at 600.

[65] Prof. Reisman describes this phenomenon as 'simulated lawmaking'. He explains that '[t]he exercise is apparently legislative but the product is simulated law or *lex simulata*: the process is a simulation of law-making in which the key actors appreciate that they neither intend nor are installing an operative prescription': Reisman, 'On the Causes of Uncertainty and Volatility in International Law', in T. Broude and Y. Shani (eds), *The Shifting Allocation of Authority in International Law: Considering Sovereignty, Supremacy, and Subsidiarity* (2008), at 33, 43. The point in the text is that some states have indicated that some treaty provisions are *lex simulata*.

[66] CEDAW, *supra* note 5, Arts 2(e) and 5.

[67] Several states ratified CEDAW with reservations that substantially narrow the obligation to protect women from private discrimination: see Committee on the Elimination of Discrimination Against Women, *Declarations, Reservations, Objections and Notifications of Withdrawal of Reservations Relating to the Convention on the Elimination of All Forms of Discrimination Against Women*, UN Doc CEDAW/SP/2006/2 (10 Apr. 2006) (listing reservations). Moreover, several have otherwise indicated that, as applied to them, that obligation is essentially inoperative: see Organization of the Islamic Conference, *Final Communiqué of the Eleventh Session of the Islamic Summit Conference*, Doc No. OIC/SUMMIT-11/2008/FC/Final (1–14 Mar. 2008), at paras 105, 112; World Conference on Human Rights, 19 Apr.–7 May 1993, *The Cairo Declaration on Human Rights in Islam*, UN Doc A/CONF.157/PC/62/Add.18 (9 June 1993), at 3.

[68] See, e.g., ICCPR General Comment 31, *supra* note 8, at para. 8; Committee on Economic, Social and Cultural Rights, *General Comment 18*, UN Doc E/C.12/GC/18 (2006), at para. 22; *Velásquez Rodríguez*, *supra* note 20, at para. 172; see also Ruggie, 'Business and Human Rights: The Evolving International Agenda', 101 AJIL (2007) 819, at 829 (asserting that treaty bodies 'indicate that the duty to protect applies to all substantive rights recognized by the treaties that private parties are capable of abusing').

[69] See, e.g., Committee on Economic, Social and Cultural Rights, *General Comment 15*, UN Doc E/C.12/2002/11 (2003) (hereinafter ICESCR General Comment 15), at para. 24; Human Rights Committee, *General Comment 27*, UN Doc CCPR/C/21/Rev.1/Add.9 (2000), at para. 6.

[70] See, e.g., *Velásquez Rodríguez*, *supra* note 20, at para. 166; App. No. 13470/87, *Otto-Preminger-Institut v. Austria*, 295 ECtHR (ser A) (1994), at paras 47–50; Case No. ACHRP/COM/A044/1, *Social and Economic Rights Action Center v. Nigeria*, African Commission on Human and People's Rights (2002), at para. 57; see also Basch, 'The Doctrine of the Inter-American Court of Human Rights Regarding States' Duty to Punish Human Rights Violations and Its Dangers', 23 *American University Int'l L Rev* (2007) 195, at 213 (reviewing jurisprudence).

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C *Conceptual Confusion*

The practice on the obligation to protect is disjointed for yet another reason: some of it confuses the obligation to protect with the attribution of the underlying abuse. Obligations to protect do not require that any abuse be attributable to the duty-holding state. They, by definition, require states to protect against abuses committed by *third parties*. The concepts become conflated, however, because decision-makers invoke principles of attribution to justify outcomes on the obligation to protect.

The problem of conflation is longstanding. Early decisions on the protection of aliens justified state bystander responsibility on the ground that bystander states somehow enable abuse.[71] The decisions suggest that a state that does nothing becomes complicit in the third-party abuse. The same logic appears in *Velásquez Rodríguez v. Honduras*, the watershed decision that interpreted the obligation into ambiguous treaty text.[72] In *Velásquez Rodríguez*, the Inter-American Court of Human Rights determined that Honduran officials actually participated in the disappearance at issue.[73] But even if they had not, Honduras failed to satisfy an obligation to protect. The court reasoned, 'Where the acts of private parties that violate [rights] are not seriously investigated, those parties are aided in a sense by the government, thereby making the State responsible on the international plane.'[74] The suggestion, again, is that a state enables abuses that it does not take seriously.[75]

More recent decisions also conflate the two concepts. In *Cyprus v. Turkey*, the European Court of Human Rights held Turkey responsible as a result of abuses committed by the Turkish Cypriot administration (the TRNC) in northern Cyprus.[76] Turkey may have participated in the TRNC's abuses.[77] But the court seemed to acknowledge that the abuses were not demonstrably attributable to Turkey under the traditional rules on attribution.[78] The court then vacillated incoherently between suggesting: (1) that attribution was nevertheless appropriate;[79] and (2) that Turkey had failed to satisfy an obligation to protect.[80] The decision is unclear on why Turkey is responsible.[81]

[71] See T. Becker, *Terrorism and the State: Rethinking the Rules on State Responsibility* (2006), at 14–23; D. Shelton, *Remedies in International Human Rights Law* (2nd edn, 2005), at 59–60.

[72] *Velásquez Rodríguez*, *supra* note 20.

[73] *Ibid.*, at para. 182.

[74] *Ibid.*, at para. 177.

[75] See *ibid.*, at para. 176–177.

[76] App. No. 25781/94, ECtHR (2001-IV), at paras 69–80.

[77] *Ibid.*, at *paras* 25–26 and 130.

[78] *Ibid.*, at para. 76 ('It is not necessary to determine whether . . . Turkey actually exercised detailed control over the policies and actions of the authorities of the TRNC') (internal quotation marks omitted).

[79] See *ibid.* (asserting that Turkey's territorial control in northern Cyprus 'entails her responsibility *for* the policies and actions of the TRNC') (emphasis added and internal quotation marks omitted); *ibid.*, at para. 77 ('[Turkey's] responsibility cannot be confined to the acts of its own soldiers and officials. . .but must also be engaged by virtue of the acts of the local administration'); *ibid.* (indicating that the TRNC's violations 'are imputable to Turkey').

[80] See *ibid.*, at paras 76–77 (using language indicative of an obligation to protect when asserting that Turkey had to 'secure' rights in the region).

[81] For an extended discussion of the court's ambiguous logic, see Milanović, 'From Compromise to Principle: Clarifying the Concept of State "Jurisdiction" in Human Rights Treaties', 8 *Human Rts L Rev* (2008) 411.

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Decisions like *Velásquez Rodríguez* and *Cyprus* collapse the analytic distinction between attribution and the obligation to protect. In each case, the obligation to protect captured state involvement short of the participation necessary for attribution.[82] The line between attributing abuses to the state (i.e., finding that it violated an obligation to respect) and making it responsible as a bystander (i.e., finding that it violated an obligation to protect) is sometimes fuzzy. But obligations to respect and protect are two separate human rights obligations, and the distinction remains important.

First, because obligations to respect are better understood, conflation risks sidelining obligations to protect. In *Behrami v. France*, the claimants argued that French troops had failed to protect two children from unexploded ordnance in post-conflict Kosovo.[83] The European Court of Human Rights re-characterized the claim as one on attribution. It determined that, because a UN organ had the mandate to demine in Kosovo, any failure to demine was attributable only to the UN.[84] Of course, France also failed to demine. If France had an obligation to protect, it might be responsible for that failure. But by framing the question in attribution terms, the court failed even to consider the obligation-to-protect.

Second, conflation wrongly suggests that state bystander responsibility is appropriate *only* where the state is somehow complicit in the abuse. As section 4.A.3 explains, conduct akin to complicity (but short of the participation necessary for attribution) is occasionally relevant to appraising state bystander responsibility. More often than not, however, a bystander state is responsible even if its conduct cannot reasonably be construed as complicity. The bystander state is responsible because it failed to satisfy an affirmative obligation to protect.

Third, conflation confuses what states must do to satisfy their human rights obligations. Because states have obligations to respect, a state is responsible whenever conduct attributable to it violates rights. The state must actually prevent the violation or accept responsibility. Obligations to protect are less onerous: a state must *try* to protect persons from abuse, but it need not guarantee that persons will be protected.[85] In other words, a state is not responsible every time a third party violates rights. It is responsible only if it does not try hard enough to protect against the third-party harm.

4 A Framework for Decision

The disjointed practice is symptomatic of a deeper problem. No generalized framework exists for assessing whether, in any particular case, a bystander state is or should be responsible. This section helps fill that void. It argues that the same basic principles animate state bystander responsibility across contexts: whether a state must protect someone from third-party harm depends on the state's relationship with the third party

[82] See *Velásquez Rodríguez, supra* note 20, at para. 182; *Cyprus, supra* note 76, at paras 25–26 and 130.
[83] App. No. 71412/01, ECtHR (2007), at paras 5–7.
[84] *Ibid.*, at paras 123–127 and 142–143.
[85] See *infra* sect. 4.C.

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and on the kind of harm caused. A duty-holding state must take reasonable measures to restrain the abusive third party. Those principles – familiar from some domestic rules on third-party liability[86] – are fairly straightforward when expressed at a high level of abstraction. They immediately raise important follow-up questions: which relationships and harms trigger the obligation? And how does one assess whether the state's measures are reasonable? Thus, in addition to identifying the basic principles, this section begins to answer those follow-up questions. It establishes benchmarks for applying the principles in concrete cases.

A *Relationship with the Abuser*

The interest in protecting people from harm motivates human rights law but does not (by itself) define obligations to protect. First, that interest does not identify which state must act in any particular case. Unless all states must protect against all third-party harms, something more is needed – some additional nexus – to justify assigning the obligation to a particular state. Second, the interest in restraining abusive third parties is inevitably in tension with desired *limits* on the state's restraints. Obligations to protect must manage that tension. They require a normative judgement that, given a state's particular relationship with the abuser,[87] the state's restraints are desirable and not overly intrusive.

[86] For example, similar principles inform (some) US duties to rescue. Those duties are like the obligation to protect in that they sometimes: (1) require duty-holders to protect against third-party harm; (2) depend on the duty-holder's relationship with the wrongdoer; (3) are duties of reasonable care; and (4) define reasonableness in part based on the severity of the harm: see *Restatement (Third) Torts: Liability for Physical Harm*, s. 3 (proposed final draft No. 1, 2005) ('Primary factors to consider in ascertaining whether the person's conduct lacks reasonable care are . . . the foreseeable severity of any harm that may ensue'); Restatement (Second) Torts, s. 315 (1965) ('There is no duty to control the conduct of a third party . . . unless . . . a special relation exists between the actor and the third person'); Harper and Kime, 'The Duty to Control the Conduct of Another', 43 *Yale LJ* (1934) 886 (examining duties to rescue). Some of the same principles inform third-party liability rules in Europe: see European Group on Tort Law, *Principles of European Tort Law Text and Commentary* (2005), Art. 4:103 (the duty may depend on a 'special relationship' or on the severity of the harm relative to the ease of avoiding it); but see the French Code Pénal, Art. 223-6, modified by Ord. 2000-916 of 19 Sept. 2000, Art. 3 [2000] Journal Officiel 14876 (the duty depends on the duty-holder's capacity). Though noteworthy, the similarities between those domestic duties and the obligation to protect should not be overstated. Domestic duties apply to private actors, and the reasons for limiting them (e.g., the preservation of individual autonomy) may not translate easily to states. The domestic duties also differ from the obligation to protect in their specific applications.

[87] Some readers may wonder whether the relevant relationship for appraising state bystander responsibility is instead the state's relationship with the *victim*. (After all, the state's relationship with the victim *is* relevant to determining whether the state may pursue a claim for her injury: see International Law Commission, *Report of the International Commission: Draft Articles on Diplomatic Protection with Commentaries*, UN Doc A/61/10 (2006), Arts 3 and 8.) For instance, these readers may cite the state's relationship with its population to explain why the obligation applies in the state's territory: see *infra*, sect. 4.A.2. The state's relationship with the victim lacks the explanatory force of its relationship with the abuser. Even in a state's own territory, the obligation varies depending on whether the abuser is a private individual, another state, or some other kind of actor: *ibid*. That result cannot be explained by the state's relationship with the victim – which for each kind of abuser is the same. That said, the state's relationship with the victim helps explain one subset of obligations to protect: the obligation of *non-refoulement* and its analogues. See *infra* note 158–159 and accompanying text.

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Conceptualizing the obligation in terms of the state's relationship with the abuser extends to this context the logic that underlies the rules on attribution. Conduct generally is attributable to a state when committed by the state's actual or *de facto* agents.[88] International lawyers disagree on precisely who is a state agent for attribution purposes.[89] They agree, however, that a state must have substantial control over a person for him or her to be its agent.[90] Control usually indicates that a state has the capacity to prevent the agent from acting badly. But control in the agency context is not exclusively or even primarily about the state's capacity to control its agents.[91] Rather, it reflects a normative judgement about the nature of the agency relationship: a state acts through its agents so should control them in order to ensure that they act properly on its behalf.[92] Indeed, a state's control over its agents is so desirable that the state is strictly responsible for their misconduct. The state is responsible regardless of whether, on the facts, it had the capacity to control a particular, misbehaving agent.[93]

A state need not control third parties (i.e., non-agents), but it may have to exercise lesser degrees of influence. Specifically, the state may have to influence third parties not to violate rights. Here again, the legal rule is not about whether a state has the capacity to restrain the abuser.[94] The rule requires a normative judgement about the

[88] See Articles on State Responsibility, *supra* note 43, Arts 4–8.

[89] Contrast *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. US)* (Merits) [1986] ICJ Rep 14, at paras 109–115 (requiring complete dependence or effective control when committing the conduct); Articles on State Responsibility, *supra* note 43, at Art. 8 (same) with *Tadic*, *supra* note 44, at paras 115–137 (advocating varied degrees of control, depending on the circumstances, and adopting a standard of overall control). For a discussion of these standards, see Milanović, *supra* note 27, at 575–588.

[90] See the sources cited *supra* at note 89.

[91] The draft Articles on State Responsibility adopted by the International Law Commission (ILC) typically assume that a state is capable of controlling its agents. But the ILC makes clear that a state's capacity to control its agents is not determinative of the attribution question. See, e.g., Articles on State Responsibility, *supra* note 43, at 41 (asserting that it is 'irrelevant whether the internal law of the State in question gives the [State] power to compel the [agent] to abide by the State's international obligations'); *ibid.*, at 43 ('the fact that [the entity] is not subject to executive control . . . [is] not decisive . . . for the purpose of attribution of the entity's conduct to the State . . .. [T]here is no need to show that the conduct was in fact carried out under the control of the State'); *ibid.*, at 45 (asserting that the state is responsible for the agent's misconduct, 'even where the [agent] has overtly committed unlawful acts under the cover of its official status or has manifestly exceeded its competence').

[92] See generally *Restatement (Third) Agency* (2006), s. 1.01.

[93] See *supra* note 91.

[94] Except perhaps in the context of humanitarian crises (see *infra* note 140), assigning the obligation primarily on the basis of capacity would be untenable. Especially capable states would have the obligation even where they lacked any particular nexus to the abuse; and even where other legal norms discouraged them from exercising power over the abuser. *Cf.* Human Rights Council, *Protect, Respect and Remedy: a Framework for Business and Human Rights*, UN Doc A/HRC/8/5 (prepared by John Ruggie) (2008), at paras 68–69 (arguing that a framework based on capacity improperly assumes that 'can implies ought', though it may be undesirable for the duty-holding entity to exercise its influence). Moreover, states without the capacity to restrain abusers would have no incentive to develop that capacity. For purposes of the obligation to protect, a state's capacity is relevant not because it determines whether a state has the obligation, but because it may help define the obligation. See *infra* notes 220–230 and accompanying text.

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nature of the state's relationship: should international law require the state to exercise governmental authority over – and thereby to influence – the particular third party at issue? The answer will sometimes be 'no'. Unlike in the agency relationship, varied considerations favour limiting when and how a state exercises authority over third parties. Some such considerations appear in human rights law itself. If a state suspects that someone in its territory is planning a killing spree, the interest in protecting potential victims favours requiring the state to restrain the suspect. But the interest in protecting the suspect (from undue state intrusion) justifies limiting the state's restraints.[95] Analogous considerations appear elsewhere in international law. For instance, international legal norms discourage states from unilaterally influencing intergovernmental organizations, except through the IOs' ordinary decision-making processes.[96] Those norms circumscribe when and how states should restrain abusive IOs. To be clear, the fact that the abuser is an IO – its 'type' – is relevant but not determinative to defining its relationship with the state. States have different kinds of relationships with abusers of the same type.

The question, then, is whether (on balance) the considerations that inform the kind of relationship at issue favour requiring the state to restrain the third party. That inquiry will sometimes be difficult or indeterminate. But for many common relationships in the international legal order, the practice offers substantial guidance.

1 Delegates

States regularly delegate to third parties governmental functions.[97] Some delegates are considered state agents such that their misconduct is attributable to the state. According to the draft articles on state responsibility adopted by the International Law Commission (ILC), the conduct of a non-state actor is attributable to a state when the actor exercises authority 'normally exercised by State organs'.[98] The ILC does not identify which authorities are sufficiently governmental for the delegate's conduct to be attributable to the state. Most of the ILC's examples involve a delegate's exercise of police power.[99] The ILC is ambiguous on when the conduct of a delegate that performs

[95] *Cf.* App. No. 23452/94, *Osman v. United Kingdom*, 29 EHRR (2000) 245, at para. 116 (asserting that the obligation to protect must be defined 'in a manner which fully respects the due process and other guarantees which legitimately place restraints on the scope of [police] action').

[96] See A.S. Muller, *International Organizations and their Host States* (1995), at 149 (asserting that a 'very important' goal of the rules on IOs is 'to ensure the independence of the organization from any interference by any individual member state'). For analogous norms on non-interference in the affairs of other states, see R. Jennings and A. Watts (eds), *Oppenheim's International Law* (9th edn, 1992), at 382–390.

[97] On the rise in delegations to private actors, see Alston, 'Downsizing the State in Human Rights Discourse', in N. Dorsen and P. Gifford (eds), *Democracy and the Rule of Law* (2001), at 357, 359. On exemplary delegations to other states or intergovernmental organizations, see Agreement on the Withdrawal of United States Forces from Iraq and the Organization of Their Activities during Their Temporary Presence in Iraq, 18 Nov. 2008, Art. 4, available at: http://graphics8.nytimes.com/packages/pdf/world/20081119_sofa_final_agreed_text.pdf; Yataganas, *Delegation of Regulatory Authority in the European Union: The Relevance of the American Model of Independent Agencies* (Jean Monnet Program, Working Paper 3/01, 2001), available at: www.jeanmonnetprogram.org/papers/01/010301.html.

[98] Articles on State Responsibility, *supra* note 43, at 43.

[99] *Ibid.*, at 42–43.

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more peripheral governmental functions, like operating a school, is properly attributable to the state.[100] The ILC recognizes, however, that the conduct of some delegates is *not* attributable to the state.

The ILC's draft articles separately address delegations to other states. They provide that the conduct of an organ of one state is attributable to a second state if the organ is 'placed at the disposal' of that second state.[101] In this scenario, the second state essentially delegates governmental functions to organs of the first. The ILC commentaries suggest that a similar logic applies when the delegate is instead the organ of an IO.[102] Attribution is appropriate, however, only when the delegated organ acts on behalf and under the exclusive control of the delegating state.[103] Here again, a delegate's conduct is sometimes not attributable to the delegating state.

Where attribution is inappropriate, the state should have a fairly robust obligation to protect. In this scenario, the state need not control the delegate. But because the delegate performs public functions under a governmental grant of authority, the state should influence it not to violate rights. Human rights treaty bodies consistently find that states have that obligation when the delegate is a private actor.[104] For instance, in *B.d.B. v. Netherlands*, the Netherlands authorized a private insurance board to administer a social security scheme.[105] The ICCPR committee determined that the Netherlands had an obligation to protect. The committee explained that a state is 'not relieved of its obligations' – in that case, the obligation to ensure equal protection of the laws – 'when some of its functions are delegated to other autonomous organs'.[106]

The same intuition animates some of the practice on delegations to intergovernmental organizations. The European Court of Human Rights has repeatedly indicated that states that transfer governmental authority to an IO must ensure that the IO respects human rights.[107] Primarily on the basis of that jurisprudence, the ILC is proposing a

[100] The ILC commentaries suggest answering that question by reference to each state's particular 'history and traditions', considering, e.g., the content of the delegated powers, the purpose for which they are delegated, and the extent to which the delegate is accountable to the state: *ibid.*, at 43.

[101] *Ibid.*, at Art. 6.

[102] *Ibid.*, at 44.

[103] *Ibid.*

[104] See, e.g., Human Rights Committee, *Concluding Observations: United Kingdom*, UN Doc A/50/40 (1995), i, at 72, para. 423 (1995) (use of force and detention); App. No. 8919/80, *Van der Mussele v. Belgium*, ECtHR (ser. A no. 70), at paras 27–29 (1983) (legal aid); App. No. 13134/87, *Costello-Roberts v. United Kingdom*, ECtHR (ser. A no. 247C) (1993) (primary education). In this context, the line between attribution and the obligation to protect is fuzzy, and decision-makers sometimes conflate the two.

[105] Human Rights Committee, *Communication No. 273/1989*, UN Doc A/44/40 (1989), at 286.

[106] *Ibid.*, at para. 6.5; see also Committee on Economic, Social and Cultural Rights, *General Comment 19*, UN Doc E/C.12/GC/19 (2008), at para. 46 ('Where social security schemes . . . are operated or controlled by third parties, State parties retain the responsibility of . . . ensuring that private actors do not compromise . . . social security').

[107] See App. No. 45036/98, *Bosphorus Hava Yollari Turizm v. Ireland*, ECtHR (2005-VI), at para. 154; App No 24883/94, *Matthews v. United Kingdom*, ECtHR (1999-I), at paras 32–34; App. No. 26083/94, *Waite v. Germany*, ECtHR (1999-I), at paras 67–73; see also Halberstam and Stein, 'The United Nations, the European Union, and the King of Sweden: Economic Sanctions and Individual Rights in a Plural World Order', 46 *CML Rev.* (2009) 13, at 21 (terming this principle the 'non-circumvention principle').

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new rule relating to state responsibility. The proposal would render delegating states responsible in some cases where the IO-delegate violates rights.[108] Under the proposal, a state would be responsible even if the abuse was attributable only to the IO (and not also to the delegating states).[109]

However, the practice suggesting that states must protect against the abuses of IO-delegates is tenuous. The ILC proposal appears limited to situations in which delegating states try to circumvent their own obligations.[110] A state apparently would not be responsible if it delegated authority in good faith and then stood by while the IO engaged in abuse. The jurisprudence of the European Court of Human Rights is similarly limited. Despite its dicta supporting the obligation, the court has held delegating states responsible only where the states themselves contributed to the abuse. Moreover, the court justifies those decisions in attribution terms. For example, in *Matthews v. United Kingdom*, Gibraltarians contested their inability to vote in elections of the European Community.[111] The court held the United Kingdom responsible, noting that it ratified the treaty denying Gibraltarians the vote.[112] In *Behrami*, the court absolved a state of responsibility because the state did *not* contribute to the abuse.[113] The *Behrami* court distinguished its earlier precedents on precisely that ground: in the earlier cases, the states themselves participated in the IO-related abuse.[114]

The court's trepidation in requiring states to restrain their IO-delegates is to some extent understandable. International legal norms generally nurture IOs and encourage them to operate independently of their member states.[115] Those norms underlie the court's jurisprudence and, in *Behrami*, bubble to the surface:

> [T]he [European] Convention cannot be interpreted in a manner which would subject the acts or omissions of [European States] which are covered by UNSC Resolutions and occur prior to or in the course of such missions, to the scrutiny of the Court. To do so would be to interfere with the fulfillment of the UN's key mission.[116]

[108] 2009 ILC Report, *supra* note 13, at 162–166.

[109] *Ibid.*; see also International Law Commission, *Report on Its Fifty-eighth Session*, UN GAOR, 61st Sess., Supp. No. 10, UN Doc A/61/10 (2006), at 277–278.

[110] The ILC commentaries accompanying the proposal assert that, for state responsibility to arise, there must be 'a significant link between the conduct of the member State *seeking to avoid compliance* and that of the international organization': 2009 ILC Report, *supra* note 13, at 170 (emphasis added). The commentaries continue: 'An assessment of a specific intent on the part of the member State of circumventing an international obligation is not required. Circumvention may reasonably be inferred from the circumstances': *ibid.*

[111] *Matthews*, *supra* note 107.

[112] *Ibid.*, at paras 33–34; see also *Waite*, *supra* note 107, at paras 67–73 (state conduct granting IO immunity).

[113] *Behrami*, *supra* note 83.

[114] *Ibid.*, at para. 151.

[115] See *Reparations for Injuries Suffered in the Service of the United Nations* [1949] ICJ Rep 174 (recognizing the independent legal personality of the UN so that it may perform its functions independently); Muller, *supra* note 96, at 149–184 (noting that states are discouraged from unilaterally influencing IOs and discussing IO immunities).

[116] *Behrami*, *supra* note 83, at para. 149.

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The *Behrami* court thus retreated from its earlier dicta. It suggested that a state is not responsible – even as a bystander – where abuses are attributable only to the IO.[117]

Focusing on the state's relationship with the abuser would enable decision-makers to defend their intuitions on delegation while protecting the interests relating to IOs. A state has a different relationship with its IO-delegate than it has with an IO in which it merely participates. The IO-delegate exercises governmental authority on behalf of the state. The state should restrain that IO, regardless of whether the state has circumvented its own obligations or contributed to the abuse. The same does not necessarily follow when the state merely participates in an IO, a scenario to which this article returns in section 4.A.3.

States may regulate all delegates at the time of delegation. For example, in *Matthews*, the United Kingdom should have protected Gibraltarians when negotiating the Treaty of the European Community. Once the delegation occurs, however, the state has fewer acceptable options for influencing an IO than a private delegate. When the delegate is an IO, the state usually should coordinate with other states to alter the delegation or otherwise oversee the IO.[118] The state need not be similarly restrained when the delegate is a private actor, so the obligation should be stronger.

2 *Territorial Subjects*

A state should also restrain third parties in its territory that are not delegates. The paradigmatic obligation-to-protect scenario involves private abuses in the state's territory. Long before the development of modern human rights law, a state had to protect foreign nationals in its territory from private harm.[119] Today, human rights and criminal law treaties extend that obligation to a broader range of persons and rights.[120] Under some interpretations, a state must protect against *any* private conduct in its territory that intrudes on someone's rights.[121]

The dominant explanation for why a state must restrain abusers in its territory is textual. Many human rights treaties bind the state only in its own territory and/or

[117] Abuses committed during an IO operation are attributable to whichever entity (the IO or the contributing member state) exercises operational control: see International Law Commission, *Report on Its Fifty-sixth Session*, UN GOAR, 59th Sess., Supp. No. 10, UN Doc A/59/10 (2004), at 100–115. Identifying that entity is sometimes difficult and therefore complicates efforts to hold violators responsible: see European Commission for Democracy through Law, *Opinion on Human Rights in Kosovo: Possible Establishment of Review Mechanisms*, Opinion No. 280/2004, CDL-AD (2004)033, at para. 79. Legal scholars have responded by arguing for expanding the circumstances in which states associated with IO operations may be responsible. See Cerone, 'Minding the Gap: Outlining KFOR Accountability in Post-Conflict Kosovo', 12 *EJIL* (2001) 469, at 486–487; Larsen, 'Attribution of Conduct in Peace Operations: The "Ultimate Authority and Control" Test', 19 *EJIL* (2008) 509, at 519–520. Those arguments are variously phrased in attribution or obligation-to-protect terms.

[118] See *supra* note 96 and accompanying text.

[119] See *supra* notes 3–4 and accompanying text.

[120] See the sources cited at *supra* note 5.

[121] See *supra* note 68 and accompanying text.

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jurisdiction.[122] If those treaties establish obligations to protect, then (the reasoning goes) the obligations are essentially territorial. That account is insufficient to explain the practice. First, it does not explain why human rights treaties codify territorial or jurisdictional limitations in the first place. Second, it does not explain when states have jurisdiction – and therefore obligations to protect – outside their national territories.[123] And third, that textual account fails to explain why obligations to protect are understood to be primarily territorial,[124] even when the treaties establishing them contain no territorial or jurisdictional limitation.[125]

This framework better explains why a state must restrain abusers in its territory. Statehood defines the relevant relationships in an area and entails the obligation to satisfy certain minimum standards, including with respect to human rights. Simply put, a state must keep its house in order – in Max Huber's words, 'display therein the activities of a State'.[126] At the same time, a state's relationship with its territorial subjects is more attenuated than its relationship with delegates, and the obligation should therefore be weaker. Return to the example of a person planning a killing spree. The state's authority over the suspect is properly limited in order to protect him from undue state intrusion. That potentially intrusive oversight is less troubling when the abuser is a delegate, because delegates themselves exercise governmental authority. Moreover, delegates assent to and benefit from the delegation relationship so are better positioned than mere territorial subjects to protect themselves.

The above analysis focuses on the obligation to restrain private abusers in the state's territory. States also host in their territories other states and intergovernmental organizations. The practice on whether states must restrain those actors from violating rights is relatively sparse. In one notable opinion, the Venice Commission of the Council of Europe addressed the obligations of European states with respect to abuses

[122] ICCPR, *supra* note 1, Art. 2(1); CAT, *supra* note 8, Art. 2; CRC, *supra* note 5, Art. 2(1); CRMW, *supra* note 5, Art 7; American Convention on Human Rights, Art. 1(1), Organization of American States, 22 Nov. 1969, OASTS No. 36, 1144 UNTS (1979) 123; European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 Nov. 4, 1950, 213 UNTS (1955) 222 (hereinafter ECHR), Art. 1.

[123] The dominant view under the human rights treaties is that states sometimes have jurisdiction outside their territories: see, e.g., App. No. 48787/99, *Ilaşcu v. Moldova and Russia*, ECtHR (2004-VII), at para. 314 ('the concept of "jurisdiction" . . . is not necessarily restricted to the national territory'); Case 10.951, *Coard v. United States*, Inter-Am. Comm'n HR, Report No. 109/99 (1999), at para. 37; ICCPR General Comment 31, *supra* note 8, at para. 10; but see Human Rights Committee, *Second and Third Periodic Reports: United States*, UN Doc CCPR/C/USA/3 (28 Nov. 2005), at paras 129–130 (asserting that the ICCPR does not apply extraterritorially). On the jurisdictional clauses in human rights treaties, see Milanović, *supra* note 81.

[124] See, e.g., Coomans, 'Some Remarks on the Extraterritorial Application of the International Covenant on Economic, Social, and Cultural Rights', in F. Coomans and M.T. Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (2004), at 183, 199 (arguing that economic, social, and cultural rights probably do not ground obligations to protect).

[125] CERD, *supra* note 5 (containing provisions with and without jurisdictional limitation); ICESCR, *supra* note 29 (no explicit jurisdictional limitation); CEDAW, *supra* note 5 (same); CRPD, *supra* note 5 (same); African Charter on Human and Peoples' Rights, Organization of African Unity, 27 June 1981, OAU Doc CAB/LEG/67/3rev.5 (same).

[126] *Island of Palmas (Netherlands v. US)*, 2 RIAA 829, at 854–855 (Perm. Ct. Arb. 1928) (Huber, sole arb.).

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committed during the CIA's rendition and detention programme.[127] The commission concluded that every European state had to protect against CIA abuses in its airspace or territory. The commission supported that conclusion by citing the well-established rule that a state must protect against *private* abuses in its territory. The commission then reasoned, 'This is even more true in respect of agents of foreign states.'[128]

That reasoning is only partially correct. The commission rightly determined that a state must restrain third parties in its territory, including when the third party is another state. But international law encourages territorial states to exercise less, not more, authority over other states than over private actors. Various legal norms limit when and how a state influences other states in its territory.[129] Such norms are intended to foster cooperation and friendly relations among states, and to preserve their legal equality. The Venice Commission implicitly accommodated those norms. It did not direct European states to invoke their expansive domestic authorities against the United States, as it almost certainly would have done if the United States were a private actor. Instead, the commission directed European states to try to restrain the CIA while also managing other treaty commitments and the rules on immunity.[130] Here again, the abuser's type affects the scope of the obligation. The obligation is weaker when the territorial subject is another state than when it is a private actor.

3 *External Actors*

Because obligations to protect are incidental to statehood, they apply primarily within the state. Absent some reason for extending the obligation extraterritorially, a state need not restrain third parties in other states.[131] If anything, international law *discourages*

[127] Venice Commission, Opinion No. 363/2005 on the International Legal Obligations of Council of Europe Member States in Respect of Secret Detention Facilities and Inter-state Transport of Prisoners, Doc. CDL-AD(2006)009 (2006) (hereinafter Venice Commission Opinion), available at: www.venice.coe.int/docs/2006/CDL-AD(2006)009-e.asp. For a review of the commission's opinion and the Council's follow-up actions, see Hakimi, 'The Council of Europe Addresses CIA Rendition and Detention Program', 101 *AJIL* (2007) 442.

[128] Venice Commission Opinion, *supra* note 127, at para. 126.

[129] See, e.g., S. Murphy, *Principles of International Law* (2006), at 259–267 (discussing rules on immunity); G. Simpson, *Great Powers and Outlaw States* (2004), at 26–29 (discussing the legal equality of states).

[130] See Venice Commission Opinion, *supra* note 127, at paras 157–159.

[131] This rule holds but faces moderate pressure for reform. The practice on private abuses largely assumes that obligations to protect are territorially limited. Some actors question that assumption where the abuser is a corporation. They claim that a state should restrain its corporate nationals, no matter where those corporations engage in abuse: see, e.g., Committee on the Elimination of Racial Discrimination, *Concluding Observations: United States*, UN Doc CERD/C/USA/CO/6 (2008), at para. 30; Commission on Human Rights, *Report of the Special Rapporteur on the Right to Food*, UN Doc E/CN.4/2006/44 (2006) (prepared by Jean Ziegler), at para. 36. The claim relies on a state's particular relationship with its corporate nationals so is consistent with the basic principles that underlie this framework. Nevertheless, the practice suggests that *that* relationship is not the sort that triggers obligations to protect: see Human Rights Council, *Business and Human Rights: Towards Operationalizing the 'Protect, Respect and Remedy' Framework*, UN Doc A/HRC/11/13 (2009) (prepared by John Ruggie), at para. 15 ('States are not required to regulate the extraterritorial activities of [private] businesses'). The practice on abuses committed by other states or IOs is scarcer (see Gaja, *supra* note 47; Brownlie, *supra* note 48), but it generally confirms the rule articulated in the text. Here again, that rule is under pressure for reform: see *supra* note 117 and *infra* notes 134–140, and accompanying text. For an extended discussion on when states *do* have extraterritorial obligations to protect, see *infra* sect. 5.A.

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states from exercising governmental authority – and thereby restraining third parties – in the territories of other states.[132]

That norm discouraging state interference carries less weight when external populations are suffering serious harm. In such cases, a state may have the right to restrain the external abuser,[133] but that right has not yet developed into a legal obligation. Decision-makers sometimes claim that it has. The claim is that all states must protect against especially severe abuses – things like war crimes,[134] genocide and mass atrocities,[135] violations of the right to self-determination,[136] and gross or systemic violations of *jus cogens* norms[137] – no matter where those abuses occur. The claim is directed at all states but is essentially unenforceable and, in practice, unenforced against particular bystander states.[138] It does not reflect a legally operative obligation to protect.[139]

[132] *See* Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, GA Res 2625, Annex, UN GAOR, 25th Sess., Supp. No. 28, UN Doc A/8028 (1970), at 122 (endorsing principle of non-interference); A. Cassese, *International Law* (2001), at 88–91, discussing sovereign equality of states.

[133] See *Barcelona Traction, Light and Power Company, Ltd. (Belgium v Spain)* [1970] ICJ Rep 3, at paras 33–34 (identifying *erga omnes* obligations as obligations that all states may enforce). Kok-Chor Tan has argued that '[i]f rights violations are severe enough to override the sovereignty interests of the offending state,. . .the severity of the situation should also impose an obligation on other states to end the violation': Tan, 'The Duty to Protect', in T. Nardin and M.S. Williams (eds), *Humanitarian Intervention* (2006), at 90, 102–106. Tan is focused on moral (and not necessarily legal) obligations to protect: *ibid.*, at n. 1. Even so, the fact that one state has committed or failed to protect against atrocities in its territory justifies overriding *that* state's sovereignty interests. The same fact does not necessarily justify overriding the sovereignty interests of all other states.

[134] See e.g., UN SC Res 681, UN Doc S/RES/681 (1990), at para. 5; International Commission of the Red Cross, *Customary International Humanitarian Law* (ed. J.-M. Hanckaerts and L. Doswald-Beck, 2005), Rule 144 (reviewing practice); see also International Commission of the Red Cross, *Commentary: III Geneva Convention Relative to the Treatment of Prisoners of War* (ed. J.S. Pictet, 1960), at 18–19 (endorsing this obligation).

[135] See *supra* notes 10 and 12 and accompanying texts.

[136] *Israeli Wall Case*, *supra* note 11, at para. 159.

[137] Articles on State Responsibility, *supra* note 43, at 113–114.

[138] On wartime atrocities, see International Commission of the Red Cross, 'Improving Compliance with International Humanitarian Law: ICRC Expert Seminars' (Oct. 2003), at 5, which asks how to translate the claim into 'state practice and policies'. On the Palestinians' right to self-determination, see, e.g., Human Rights Council Res 13, UN Doc A/HRC/13/L.27 (19 Mar. 2010), which pushes to realize the right but does not invoke any obligation to protect. On the Responsibility to Protect, see Institut de Droit International, 10th Commission, 'Present Problems of the Use of Force in International Law' (prepared by Reisman), at 176, which concludes that the 'responsibility' in this context is 'not a "duty" to act'. On the claim concerning systemic violations of *jus cogens* norms, see Articles on State Responsibility, *supra* note 43, at 114, which acknowledges that the claim is not yet law. Finally, for a general argument that 'an undistributed duty . . . to which everybody is subject is likely to be discharged by nobody unless it can be allocated in some way', see D. Miller, National Responsibility and Global Justice (2007), at 98.

[139] Note that, even though individual states have no obligation to protect in this context, they may have a soft obligation not to obstruct multilateral efforts to protect: see Articles on State Responsibility, *supra* note 43, Art. 41 (advancing an obligation to cooperate). For arguments that such claims are best satisfied multilaterally, rather than by assigning individual states obligations to protect, see Tan, *supra* note 133, at 102–106; Walzer, *supra* note 36, at 242.

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Some scholars have argued for making that claim operational by assigning or differentiating the obligation based on each state's capacity to avert the harm.[140] The argument has some doctrinal support in the *Genocide Case*, in which the International Court of Justice examined Serbia's responsibility resulting from genocidal acts committed by a group of Bosnian Serbs in Bosnia.[141] The court determined that the genocidal conduct was not attributable to Serbia but that Serbia failed to satisfy an obligation to protect.[142] That obligation – found in the Genocide Convention – presumably bound all state parties. Yet the court determined that the obligation varied depending on each state's influence over the abusers:

> Various parameters operate when assessing whether a State has duly discharged the obligation concerned. The first, which varies greatly from one State to another, is clearly the capacity to influence effectively the action of persons likely to commit, or already committing genocide.[143]

The passage focuses on the state's 'capacity to influence' the abusers.

Yet something else is clearly animating the court's decision. Serbia was not a disconnected bystander with only the capacity to influence the Bosnian Serbs. Serbia supported the Bosnian Serbs politically and militarily, and helped oversee and direct them.[144] That relationship is relevant, according to the above passage, because it means that Serbia was especially capable of restraining the Bosnian Serbs. More than that, the relationship indicates that Serbia *should* have restrained the Bosnian Serbs. Indeed, the court itself assessed capacity in part through that normative lens. It explained that a state's capacity must 'be assessed by legal criteria' that limit whether the state may act in a particular situation and that define the state's 'legal position vis-à-vis the situations and persons facing the danger'.[145] Such legal criteria are irrelevant to the state's capacity to restrain the abuser. They are relevant because they reflect normative judgements about whether the state should restrain the abuser. In the event, Serbia's support for the Bosnian Serbs put them in a position to violate rights. Having substantially enabled that conduct, Serbia could not lawfully stand by, even though other states with the capacity to restrain the Bosnian Serbs probably could.

To be clear, the court held Serbia responsible without finding that Serbia participated or was complicit in genocide.[146] The court's standard for complicity is consistent with the more general rules on aiding and assisting responsibility. According to the draft

[140] See, e.g., Pattison, 'Whose Responsibility to Protect? The Duties of Humanitarian Intervention', 7 *J Military Ethics* (2008) 262. The argument is that those who can act during a humanitarian crisis should. Assigning the obligation based on each state's capacity may be normatively appealing in this context, but it does not reflect current expectations: see *supra* note 138, *infra* notes 144–155, and accompanying texts.

[141] *Supra* note 10. Serbia inherited the case when the Federal Republic of Yugoslavia (FRY) dissolved. Although the court assessed the conduct of the FRY (and not of Serbia as such), I use Serbia interchangeably with the FRY for ease of reference.

[142] *Ibid.*, at paras 386 and 438.

[143] *Ibid.*, at para. 430.

[144] *Ibid.*, at paras 422 and 434–438; see also *Prosecutor v. Tadic*, Case No. IT-94-1-A, Judgment (Appeals Chamber, 15 July 1999), at para. 156.

[145] *Genocide Case*, *supra* note 10, at para. 430.

[146] *Ibid.*, at para. 424.

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articles on state responsibility, an assisting state is responsible if it provides assistance with 'a view to facilitating the abuse'.[147] The standard requires something between knowledge and purpose with respect to the particular abuse at issue.[148] A state that gives the abuser general support not directed at any particular misconduct is not responsible for assisting in the misconduct. But that state may have an obligation to protect. Even though Serbia did not assist in the particular acts of genocide at Srebrenica, it unequivocally acted badly. Its causal connection to the abuse provides the normative justification for assigning it an obligation to protect.[149]

Other practice confirms that a state may have an obligation to protect where the state substantially enables an external actor to violate rights. In 2008, Georgia claimed that Russia's conduct in South Ossetia and Abkhazia (two breakaway Georgian regions) violated the Convention on the Elimination of All Forms of Racial Discrimination (CERD).[150] According to Georgia, Russia provided 'unprecedented and far-reaching support' to Georgian separatist groups that acted discriminatorily.[151] The International Court of Justice has not yet decided the case on the merits so has not assessed whether the separatists' allegedly discriminatory conduct is attributable to Russia. Even if it is not, Russia may have an obligation to protect.[152] In an order on provisional measures, the court directed Georgia and Russia to 'do all in their power to ensure that public authorities and public institutions under their control *or influence* do not engage in acts of racial discrimination'.[153] The influence language hints at an obligation to protect: assuming that Russia did not control but substantially supported the separatists, Russia should have influenced them not to violate rights.

Analogous considerations seem to inform *Cyprus v. Turkey* and *Ilaşcu v. Moldova and Russia*. In each case, the defendant state propped up and provided immense support to an abusive external actor. Turkey supported the Turkish Cypriot administration in northern Cyprus,[154] and Russia did the same for the separatists in Moldova.[155] But the claimants could not demonstrate that, since ratifying the European Convention on Human Rights, those states participated in the abuses at issue. The European Court of Human Rights nevertheless held them responsible. The court is unclear on why the defendant

[147] Articles on State Responsibility, *supra* note 43, at 66.

[148] *Ibid.*, at 65–67.

[149] Cf. App. No. 15318/89 *Loizidou v. Turkey* (preliminary objections), 310 ECtHR 7 (1995), at para. 62 (1995) ('the responsibility of Contracting Parties can be involved because of acts of their authorities . . . which produce effects outside their own territory'). In international criminal law, individuals are sometimes responsible for complicity if they provide the sort of general assistance described in the text: see Milanović, 'State Responsibility for Genocide: A Follow-Up', 18 *EJIL* (2007) 669, at 680–684. When complicity is interpreted more broadly, it may include some of the same conduct that gives rise to state bystander responsibility.

[150] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russia)*, Provisional Measures [2008] ICJ Rep 140 (15 Oct. 2008), at para. 109.

[151] *Ibid.*, at para. 13; see also *ibid.*, at paras 7–18.

[152] *Ibid.*, at paras 144 and 149(4).

[153] *Ibid.*, at para. 149(4) (emphasis added).

[154] *Cyprus*, *supra* note 76, at paras 76–77.

[155] *Ilaşcu*, *supra* note 123, at para. 392 (finding that Russia had 'decisive influence', such that the separatists 'survive[d] by virtue of [Russia's] military, economic, financial, and political support').

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states are responsible.[156] In the absence of evidence that the states participated in the particular abuses at issue, the correct answer lies in the obligation to protect. Turkey and Russia installed and provided considerable support to external actors that violated rights. Having extensively enabled those actors, the states could not lawfully stand by.

A similar logic may explain *non-refoulement* and its varied analogues (e.g., in situations involving extraditions and extraterritorial captures). A state that transfers someone to another state, despite the risk of abuse, usually does not transfer the person 'with a view to facilitating' that abuse. Absent some indication to the contrary, the state's involvement does not rise to the level necessary for assisting responsibility. Rather, the state is responsible because it fails to satisfy an obligation to protect. By transferring the person, the duty-holding state substantially enables an external actor to violate rights.[157] Like in other contexts, that enabling relationship seems to trigger the obligation to protect. Having said that, the state's relationship with the abuser admittedly has less explanatory force in this than in other contexts. A transferring state has no particular relationship with the abuser, other than the enabling relationship created by the transfer. Moreover, the practice indicates that *non-refoulement* and its analogues also depend on the state's relationship with the *victim*.[158] So this set of obligations to protect is, to some extent, *sui generis*.[159] A state's relationship with the abuser offers only a partial account of when and why the state must protect against third-party harm.

In sum, the general rule that a state need not influence external actors is subject to an important exception: a state may have to restrain external actors if it substantially

[156] On the lack of clarity in *Cyprus*, see *supra* notes 76–81 and accompanying text. The *Ilaşcu* court is similarly unclear. On the one hand, the court suggests that Russia was responsible for the abuses as such: 'there [was] a continuous and uninterrupted link of responsibility on the part of the Russian Federation': *supra* note 123, at para. 392. On the other hand, the court described the obligation as an obligation of conduct – one requiring some 'attempt to put an end to the applicants' situation': *ibid.* That description leaves open the possibility that Russia failed to satisfy an obligation to protect.

[157] *Cf.* K. Wouters, *International Legal Standards for the Protection from Refoulement* (2009) 53 ('there must be a consequential relationship or causal link between the state's conduct and the fact that the refugee is forced to go places where he is at risk').

[158] In deciding whether to prescribe or apply the obligation, decision-makers variously consider: (1) where the duty-holding state first encountered the victim – whether (a) in the state's own territory or jurisdiction, (b) on the high seas, (c) in a third state, or (d) in the destination state; (2) whether the duty-holding state pursued the victim; and (3) whether the abuser exercises governmental authority in the destination state. See, e.g., App. No. 61498/08, *Al-Saadoon v United Kingdom*, ECtHR (2010, not yet reported), at para. 140 (focusing on (2)); Committee against Torture, *Communication No. 138/1999: MPS v. Australia*, UN Doc. A/57/44 (2002), at 111, para. 7.4 (focusing on (3)); Wouters, *supra* note 157, at 46–56, 80–82, 202–221, 244, 369–376, 391, 434–438, 540–541, 553–559 (discussing (1) and (3)). The state's relationship with the abuser is unaffected by factors (1)(a)–(c) or by factor (2). Those factors likely go to the state's relationship with the victim. By contrast, the state's relationship with the victim cannot explain factor (3) or the distinction between factors (1)(c) and (d). Those factors are relevant because they inform the state's relationship with the abuser.

[159] The proper scope of these obligations is contested and may vary by treaty. See *supra* note 8; contrast, e.g., UN High Commissioner for Refugees, *Opinion: The Scope and Content of the Principle of* Non-refoulement (2001) (prepared by Lauterpacht and Bethlehem), at para. 14, available at: www.unhcr.org/419c75ce4.html (arguing that *non-refoulement* applies when someone 'takes refuge in the diplomatic mission of another State or comes under the protection of the armed forces of another state . . . in the country of origin') with, e.g., Noll, 'Seeking Asylum at Embassies: A Right to Entry under International Law?', 17 *Int'l J Refugee L* (2005) 542 (disagreeing and defining the obligation by treaty). Understanding the obligations in relational terms may help advance the debate, though further study is needed on when and how the state's relationships with the abuser and the victim matter.

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enables them to violate rights. The degree of support necessary to trigger the obligation is somewhat uncertain. The practice indicates that the enabling state's support must be considerable – something more than mere financial aid but less than the knowing or purposeful participation necessary for attribution.[160] That contribution justifies assigning the state an obligation to protect. After all, a state that substantially supports an external actor has already involved itself in another state's affairs. The normative considerations that usually discourage states from restraining external actors – the interests in non-interference and fostering friendly relations among states – either are less pronounced or have already been compromised. They become outweighed by the interest in protecting human lives. Moreover, the enabling state's contribution warrants assigning the obligation to *that* state, even though not to all others.

B *Severity of Harm*

The obligation to protect also depends on the kind of harm caused.[161] States must protect only against conduct that: (1) causes serious physical or psychological harm; or (2) affects people because they belong to a vulnerable group.[162]

Conduct in that first category typically intrudes on the victim's physical security: torture, rape, slavery, extrajudicial killings, forced disappearances, and other cruel or inhuman treatment all trigger obligations to protect. Occasionally, conduct causes sufficiently serious psychological harm without intruding on a person's physical space. In *EM v. Secretary of State*, the House of Lords examined the planned deportation of a mother and child where the home country would strip the mother of custody.[163] The claimants asserted that the loss of custody would violate the right to 'private and family life' under the European Convention on Human Rights.[164] The Lords underscored that not all invasions of privacy, or even all decisions stripping a parent of custody, cause sufficient harm to trigger the obligation.[165] But the loss of custody would cause especially egregious harm

[160] None of the practice supports the proposition that the mere provision of financial aid is sufficient to trigger the obligation. A rule that requires more substantial assistance makes sense: international law should encourage states to help one another without the risk of assuming additional obligations. The normative balance shifts, however, where a state's assistance is both substantial and causally connected to the recipient's abuse.

[161] Human rights law typically assesses severity both in kind and in scale. See generally, e.g., ECS Res 1503, UN. ESCOR, 48th Sess., UN Doc E/RES/1503(XLVIII) (1970); *Restatement (Third) of Foreign Relations Law* (1987), s. 702; Shelton, *supra* note 71, at 389. As explained at *infra* notes 215–219, the scale of the harm affects the content but not the existence of any obligation to protect. The kind of harm affects both the existence and the content of the obligation.

[162] Notably, all of this conduct would violate a state's obligations to respect, if committed by state agents. See generally ICCPR, *supra* note 1, and the treaties cited at *supra* note 5.

[163] [2008] UKHL 64.

[164] ECHR, *supra* note 122, Art. 8(1).

[165] The Lords were applying the jurisprudence of the European Court of Human Rights. Under that jurisprudence, *refoulement* is prohibited where the anticipated conduct would violate the right to life or freedom from mistreatment. See Bader, *supra* note 8, at paras 41–48. *Refoulement* may also be prohibited where the anticipated conduct would violate some other right, but only if the harm would be especially severe: see Den Heijer, 'Whose Rights and Which Rights? The Continuing Story of *Non-Refoulement* under the European Convention on Human Rights', 10 *European J Migration & L* (2008) 277 (reviewing cases).

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in *EM*, because the mother had cared for the child since birth, and the child knew no family in the home country. The United Kingdom had an obligation to protect.[166]

The second category consists of conduct that discriminates against or otherwise affects people by virtue of their membership of a vulnerable group. Such conduct causes severe harm because it reinforces existing inequalities and undermines the victims' capacity to participate fully in public life. For instance, in the *Yanomami* case, the Inter-American Commission on Human Rights examined private conduct that affected the health and cultural integrity of a nearby indigenous community.[167] Because indigenous, the Yanomami were especially susceptible to the harmful consequences of that conduct. Brazil had an obligation to protect.

Limiting the obligation to those two categories of conduct resolves some apparent inconsistencies in the practice.[168] Recall the claim that states must protect against *all* harms, no matter how severe.[169] That claim does not reflect the practice as applied. Treaties that expressly establish the obligation do so almost exclusively for conduct falling in the above two categories.[170] Criminal law treaties require states to protect people from specific conduct that causes serious physical harm (e.g., acts of terrorism[171] or genocide[172]). Human rights treaties variously require states to protect against acts of violence,[173] discrimination,[174] and invasions of privacy.[175] Further, most human rights treaties that expressly establish obligations to protect do so for people who belong to potentially vulnerable groups: women,[176] children,[177] racial minorities,[178] migrant workers,[179] and persons with disabilities.[180]

The post-ratification practice follows that same basic pattern. States regularly address, in their periodic reports under the universal human rights treaties, the measures they take to satisfy obligations to protect. Those measures almost always target conduct

[166] *EM, supra* note 163, at paras 15–18; see also Human Rights Committee, *Communication No. 946/2000: LP v. Czech Republic*, UN Doc A/57/40, ii (2002), at 294-300 (requiring state to protect against parent–child separation).

[167] Case 7615, Inter-Am. Comm'n HR 24, OEA/ser. L/V./II.66, doc. 10 rev.1 (1985), *available at* http://www.cidh.oas.org/annualrep/84.85eng/Brazil7615.htm.

[168] See *supra* sect. 3.B.

[169] See *supra* note 68 and accompanying text.

[170] See the treaties cited at *supra* note 5.

[171] See, e.g., Convention on Aircraft Sabotage, *supra* note 5; Terrorist Bombing Convention, *supra* note 5.

[172] Convention on the Prevention and Punishment of the Crime of Genocide, adopted 9 Dec. 1948, GA Res 260 A (III), 78 UNTS 227 (entered into force 12 Jan. 1951), Arts I and IV.

[173] See, e.g., CEDAW, *supra* note 5, Art. 6; CERD, *supra* note 5, Art. 4; CRC, *supra* note 5, Art. 19; CRMW, *supra* note 5, Art. 16(2); CRPD, *supra* note 5, Art. 16.

[174] See, e.g., CERD, *supra* note 5, Art. 2(d); CEDAW, *supra* note 5, Art. 2(e); CRMW, *supra* note 5, Art. 25; CRPD, *supra* note 5, Art. 4(e); ILO Convention (No. 111) Concerning Discrimination (Employment and Occupation), adopted on 25 June 1958, available at: www.ilo.org/ilolex/english/convdisp1.htm (169 states parties).

[175] See, e.g., CRC, *supra* note 5, Art. 16; CRMW, *supra* note 5, Art. 14; CRPD, *supra* note 5, Art. 22. Some invasions of privacy fall in the above two categories: see, e.g., App No 39272/98, *M.C. v. Bulgaria*, ECtHR (2003) (rape); *supra* notes 163–166 and accompanying text (transfer of custody to unfamiliar parent in unfamiliar country). Others do not: see, e.g., *infra* notes 184–185 and accompanying text (attention by paparazzi press).

[176] CEDAW, *supra* note 5.

[177] CRC, *supra* note 5.

[178] CERD, *supra* note 5.

[179] CRMW, *supra* note 5.

[180] CRPD, *supra* note 5.

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falling in the above categories.[181] Treaty bodies focus on the same conduct. They overwhelmingly apply the obligation to conduct that causes serious physical harm or discriminates against members of vulnerable groups.[182]

To be sure, decision-makers occasionally apply the obligation more broadly.[183] In *Von Hannover v. Germany*, the European Court of Human Rights determined that constant attention by the paparazzi press triggered the obligation to protect.[184] The court implicitly acknowledged that the conduct, though intrusive, was not especially severe.[185] It nevertheless held Germany responsible. Similarly, in its observations on Japan, the ICESCR committee expressed concern that Japan inadequately protected workers from excessive work hours.[186] The committee did not assess the severity of that harm, whether in general terms or on the facts of any particular case. But long working hours are unlikely to have been sufficiently severe, across the board, to fall in the above two categories.[187] In the practice, cases like *Von Hannover* and the observations on Japan are outliers.

Some readers may seize on such cases to argue that the obligation applies more broadly.[188] These readers likely are concerned because limiting the obligation to particular

[181] See, e.g., Honduras ICCPR Report, *supra* note 6, at paras 45–53; Tajikistan CEDAW Report, *supra* note 6, at 7–8.

[182] For useful compilations, see www.bayefsky.com/bytheme.php/id/1219 (follow 'Concluding Observations' and 'Jurisprudence' hyperlinks). For specific examples, see Human Rights Committee, *Concluding Observations: Mali*, UN Doc A/58/40, i (2003), at para. 81(16), at 47 (slavery); Human Rights Committee, *Concluding Observations: Russian Federation*, UN Doc A/59/40, i (2003), at 20, para. 63(13) (acts of violence); Committee on Economic, Social, and Cultural Rights, *Concluding Observations: Togo*, UN Doc E/2002/22 (2001), at 57, paras. 316 and 322–323 (discrimination). Treaty bodies regularly pressure states to protect members of vulnerable groups: see, e.g., Committee on Economic, Social, and Cultural Rights, *Concluding Observations: Italy*, UN Doc E/C.12/1/Add.103 (2004), at para. 25 ('disadvantaged and marginalized groups, in particular immigrants and Roma'); App. No. 46477/99, *Edwards v. United Kingdom*, ECtHR (2002), at para. 56 (detainees); Committee on the Elimination of Racial Discrimination, *Concluding Observations: Brazil*, UN Doc CERD/C/304/Add.11 (1996), at para. 11 ('most vulnerable populations').

[183] See, e.g., App. No. 36022/97, *Hatton v. United Kingdom*, ECtHR (2003) (noise pollution from a nearby airport intruding on right to privacy).

[184] App. No. 59320/00, ECtHR (2004).

[185] *Ibid.*, at paras 58 and 79 (acknowledging that states have a margin of appreciation in protecting against this kind of harm).

[186] Committee on Economic, Social, and Cultural Rights, *Concluding Observations: Japan*, UN Doc E/C.12/1/Add.67 (2001), at para. 19.

[187] The practice before the International Labour Organization is, at best, ambiguous on whether states must restrain employers to protect people from long work hours. Several ILO conventions limit working hours, but those conventions are not widely ratified: see, e.g., ILO Convention (No. 1) Concerning Hours of Work (Industry), adopted 28 Nov. 1919 (47 states parties); ILO Convention (No. 30) Concerning Hours of Work (Commerce and Offices), adopted 28 June 1930 (27 states parties); ILO Convention (No. 47) Concerning Forty-Hour Week, adopted 22 June 1935 (14 states parties); but *cf.* ILO Convention (No. 14) Concerning Weekly Rest (Industry), adopted 17 Nov. 1921 (119 states parties) (providing for one day of rest per week and almost never invoked by or before the ILO). All ILO Conventions, with lists of states parties, are available at: www.ilo.org/ilolex/english/convdisp1.htm. The complaints and representations made under each ILO convention are available at www.ilo.org/ilolex/english/iloquery.htm.

[188] This argument may be animated by the belief that human rights should not be ordered hierarchically. For a discussion on the hierarchical ordering of rights, see Shelton, 'Hierarchy of Norms and Human Rights: Of Trumps and Winners', 65 *Saskatchewan L Rev* (2002) 301. The point here is not that some rights are more important than others, but that some abuses cause more harm than others. For instance, rape and constant attention by the paparazzi press both invade the victim's right to privacy (see *supra* note 175), but rape causes more serious harm.

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harms exposes a potential lacuna in the human rights regime: certain conduct may intrude on rights but not trigger any obligation to protect. As a practical matter, that limitation is most relevant for economic, social, and cultural rights. Although some conduct that intrudes on those rights triggers the obligation,[189] much such conduct does not.

Human rights law partly addresses that lacuna with obligations to fulfil. Obligations to fulfil require states to enable rights holders, instead of restraining abusers. To understand how the two obligations intersect, consider the right to work. A company that dismisses an employee interferes with his right to work, but absent some serious harm or evidence of discrimination, the dismissal does not trigger any obligation to protect.[190] The state need not restrain the company from dismissing the employee. Nevertheless, the state may have to fulfil the employee's right to work – for example, by offering educational programmes or trying to target the causes of unemployment. Because obligations to protect and fulfil are complementary, obligations to fulfil may render obligations to protect less compelling.[191] Protecting people from workplace dismissal is less critical if they may transfer easily to new jobs.

This article leaves open whether obligations to protect *should* apply more broadly.[192] The answer depends partly on the content of state obligations to fulfil.

[189] See, e.g., Committee on Economic, Social and Cultural Rights, *Concluding Observations: Morocco*, UN Doc. E/C.12/1/Add.55 (2000), at paras 30 and 54 (urging state to protect people from contaminated foodstuffs causing death or serious health problems).

[190] The ICESCR committee's general comment on the right to work asserts that the right grounds an obligation to protect, but the comment uses hopelessly vague language to define that obligation: Committee on Economic, Social, and Cultural Rights, *General Comment 18*, UN Doc E/C.12/GC/18 (2006), at paras 25 and 35. The committee's most concrete suggestions are that states must protect against forced labour and protect persons who are especially vulnerable: *ibid.*, at paras 25 and 31. Those suggestions are consistent with the two categories discussed in the text. ILO Convention (No. 158), Concerning Termination of Employment, adopted 22 June 1982, available at: www.ilo.org/ilolex/english/convdisp1.htm, establishes slightly broader protections against workplace dismissal. However, that convention has been ratified by only 34 states (see *ibid.*), and its obligations are rarely invoked by or before the ILO: see www.ilo.org/ilolex/english/iloquery.htm.

[191] For a more extensive discussion on how these obligations intersect, see S. Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (2008), at 162–164 and 209–210. Obligations to protect and fulfil are sometimes conflated, just as obligations to respect and protect are. Conflation occurs primarily for two reasons. First, a third party's conduct sometimes triggers the obligation to fulfil. The obligation is one to fulfil (and not to protect) because the state may satisfy it without restraining the third party. For instance, in *Port Elizabeth Municipality v. Various Occupiers*, 2004 (12) BCLR 1268 (SA), the South African Constitutional Court forbade the state from evicting squatters from private land. The evictions (instigated by private actors) interfered with the squatters' right to housing. But the case does not stand for the proposition that a state must protect people from eviction by regulating or otherwise restraining private landowners. Rather, *Port Elizabeth* requires the state to fulfil the right to housing. A state may fulfil that right in all sorts of ways other than by restraining private evictors, including by providing accommodation to those in need. Second, the distinction between obligations to protect and fulfil is sometimes confused because, in certain contexts, the same measures may satisfy both obligations. Consider measures mandating parental leave: see, e.g., Committee on Economic, Social, and Cultural Rights, *Concluding Observations: Malta*, UN Doc E/2005/22 (2004), at 45, paras. 344 and 362. Such measures may protect women from discrimination in the workplace – conduct that triggers the obligation to protect. The same measures help fulfill the right to work, because they enable people to continue working when becoming parents.

[192] My goal here is not to articulate a comprehensive moral and political theory on human rights obligations. Rather, my goal is to identify current expectations on the obligation to protect and thereby to define how the obligation might actually be implemented. For a defence of this approach, see J.W. Nickel, *Making Sense of Human Rights* (1987), at 96–97; Shue, 'Making Exceptions', 26 *J Applied Philosophy* (2009) 307, at 308.

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Those obligations are still rather underdeveloped.[193] The answer also depends on the weight of any competing considerations.[194] The desire to protect people from third-party harm must be balanced against the interests in allocating finite resources consistently with social priorities;[195] encouraging rights holders to protect themselves;[196] and defining universal obligations for states with vastly different economic, cultural, and political traditions.[197] Currently, only conduct falling in the above two categories triggers the obligation to protect. Efforts to extend the obligation to other conduct should account for obligations to fulfil and for the relevant competing considerations.

C *Reasonable Measures*

The state's relationship with the abuser and the severity of the harm together determine whether a state has the obligation to protect. Once a state has that obligation, the question becomes: what must the state do? The defining feature of the obligation to protect is that it requires states to restrain third parties from committing abuse. States have myriad measures for restraining third parties.[198] Such measures differ in kind (e.g., criminal or diplomatic sanction); in their intended immediate effect (e.g., to avert an imminent harm or establish a general deterrent); and in their intended target (e.g., a particular abuser or a diffuse group of potential abusers). In any particular scenario, however, only some measures will be both available to the state and sufficient to satisfy its obligation to protect. The state must take reasonable measures to restrain the abuser.

That formulation makes clear that the obligation is an obligation of conduct.[199] A state must *try* to restrain abusers – it must take reasonable measures toward

[193] See Fredman, *supra* note 191, at 3.

[194] *Cf.* J. Raz, *The Morality of Freedom* (1986), at 172 (1986) (explaining that a rights-based obligation is justifiable 'only to the extent that there are no conflicting considerations of greater weight').

[195] See Nickel, 'How Human Rights Generate Duties to Protect and Provide', 15 *Human Rts Q* (1993) 77, at 81.

[196] See Miller, *supra* note 138, at 108.

[197] See Knox, *supra* note 38, at 19–30 and 34–36; Reisman, 'On the Causes of Uncertainty and Volatility in International Law', in T. Broude and Y. Shnay (eds), *The Shifting Allocation of Authority in International Law: Considering Sovereignty, Supremacy, and Subsidiarity* (2008), at 33, 35–37.

[198] See, e.g., Committee on the Rights of the Child, *Second Periodic Report: Chad*, UN Doc CRC/C/TCD/2 (2007), at paras 122–123 (educational campaign); ICESCR General Comment 15, *supra* note 69, at para. 24 (oversight mechanisms); Simma and Pulkowski, 'Of Planets and the Universe: Self-Contained Regimes in International Law', 17 *EJIL* (2006) 483 (countermeasures). International lawyers have long debated whether states may use military force to protect external populations from humanitarian crises: see, e.g., Goodman, 'Humanitarian Intervention and Pretexts for War', 100 *AJIL* (2006) 107, at 107–110. This article does not resolve that debate. To the extent that a state may lawfully use force to protect against third-party harm, the use of force is one measure the state may take to satisfy its obligation to protect. However, the obligation never *requires* a state to use military force. For the reasons why, see the discussion on state discretion at *infra* notes 208–211 and accompanying text.

[199] Some scholarship mistakes obligations of conduct for obligations of result. For an overview of the literature, see Sepúlveda, *supra* note 32, at 184–196. I use the phrase 'obligation of conduct' as the ICJ did in the *Genocide Case*, to mean that a state is not 'under an obligation to succeed' but must 'employ means' to try: *Genocide Case*, *supra* note 10, at para. 430.

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that end – but it need not guarantee that abusers will be restrained. The practice confirms as much.[200] Treaties establishing obligations to protect uniformly require states to take measures, not to achieve particular outcomes.[201] The same holds for due diligence standards, which dominate the practice on private abuses[202] and the ICJ invoked in the *Genocide Case*.[203] States must exercise whatever diligence is due without guaranteeing the end result.[204] Defining the obligation as an obligation of conduct is consistent with its conceptual underpinnings. States are discouraged from exercising complete control over third parties[205] so should not be strictly responsible for third-party abuses.[206]

The reasonableness standard is context-specific,[207] but several factors inform whether particular measures are reasonable. First, the reasonableness inquiry depends on the degree of discretion accorded to states in any particular context. Some practice grants states considerable discretion to select their own measures.[208] Treaties that establish obligations to protect often require states to take appropriate measures, without defining which measures are appropriate.[209] Similarly, due diligence standards require states to exercise whatever diligence is due; they do not define such diligence. According states some discretion makes sense because states are, in the first instance, best situated to assess and respond to particular instances of abuse. Given the range

[200] *Non-refoulement* and its analogues may appear exceptional, because states often satisfy them by achieving the end result. They are not. Those obligations require states to try to protect people (e.g., by not transferring them or taking other protective measures) when there is a real risk of abuse: see Wouters, *supra* note 157, at 542–43. A state that transfers someone in the absence of that risk does not violate the obligation, even if the person ends up being abused. Likewise, a state that transfers someone (and takes no other protective measures) despite that risk violates the obligation, even if the person is never abused: see *ibid.*, at 552–553.

[201] See, e.g., Terrorist Bombing Convention, *supra* note 5; CEDAW, *supra* note 5, Art. 2(e).

[202] See Knox, *supra* note 38, at 21–24.

[203] *Genocide Case*, *supra* note 10, at para. 430 (asserting that the obligation to protect is an obligation of conduct and defining it in terms of due diligence).

[204] See Pisillo-Mazzeschi, *supra* note 4, at 30 (explaining that due diligence standards are '"obligations of diligent conduct" as opposed to "obligations of result"').

[205] See *supra* notes 88–96 and accompanying text.

[206] But *cf.* Chinkin, 'A Critique of the Public/Private Dimension', 10 *EJIL* (1999) 387, at 395 (asking whether states should be strictly responsible for abuses committed by third parties).

[207] *Cf.*, e.g., *Genocide Case*, *supra* note 10, at para. 430 ('the notion of "due diligence" . . . calls for an assessment *in concreto*'); Pisillo-Mazzeschi, *supra* note 4, at 44 (asserting that any due diligence standard 'has undoubtedly an elastic and relative nature').

[208] See, e.g., *Neer v. Mexico (US v. Mexico)*, 4 Rep. Int'l Arb. Awards (1926) 60 (finding the state not responsible, even though the measures taken were less rigorous and effective than they could have been); App. No. 33401/02, *Opuz v. Turkey*, ECtHR (2009), at para. 165 ('it is not the Court's role to replace the national authorities and to choose in their stead from among the wide range of possible measures that could be taken to secure compliance with their [obligation to protect]').

[209] See, e.g., CEDAW, *supra* note 5, Art. 2(e); CRC, *supra* note 5, Art. 2(2). A variant of this approach addresses the form the measures should take (e.g., legislative or administrative) without defining their substantive content: see, e.g., CERD, *supra* note 5, Art. 2(d).

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of possible circumstances and measures, international law cannot possibly specify the measures that states must take in every obligation-to-protect scenario. But the obligation would be meaningless if states had complete discretion to define their own conduct. So to varying degrees the practice also constrains state discretion. Several treaties identify specific (usually criminal) measures that states must take.[210] Other treaties are presumed to require such measures.[211] The more expectations coalesce around specific measures, the less discretion states have to select their own – in other words, the less reasonable it is for states not to take the measures expected of them.

Second, whether the state's measures are reasonable depends on the two variables discussed above. The state's relationship with the abuser and the severity of the harm affect not only whether a state has the obligation, but also what that obligation requires. Measures that are reasonable in one kind of relationship or for one kind of harm may well be unreasonable in or for another. Return to the Venice Commission's opinion on CIA abuses in Europe. European states almost certainly would have had to pursue criminal measures against the CIA if it were a private actor.[212] But criminal measures are often inapt or ineffective against organs of another state.[213] The commission correctly determined that European states could reasonably pursue non-criminal measures against the CIA, even if such measures would be unreasonably lax for private abusers. A similar dynamic operates under the severity variable. States generally must pursue criminal measures against private individuals who intentionally cause severe bodily harm; the same is not true for individuals who cause less serious harm.[214]

Third, the reasonableness of the state's measures depends on the scope of the problem that they are designed to address. Decision-makers unquestionably consider the scale of abuse when assessing state bystander responsibility, but they usually fail to explain why scale matters.[215] The scale of abuse does not affect whether a state has the obligation.

[210] See, e.g., Convention on Aircraft Sabotage, *supra* note 5; Terrorism Bombing Convention, *supra* note 5; CERD, *supra* note 5, Art. 4.

[211] For example, states regularly cite domestic criminal provisions as evidence that they satisfy the obligation to protect: see, e.g., Committee on the Rights of the Child, *Second Periodic Report: Chad*, UN Doc CRC/C/TCD/2 (2007), at para. 69; Committee on the Elimination of Discrimination Against Women, *Combined Initial, Second, and Third Periodic Report: Tajikistan*, UN Doc CEDAW/C/TJK/1-3 (2005), at 7. Moreover, treaty bodies often pressure states to take criminal measures: see, e.g., Human Rights Committee, *Concluding Observations: Benin*, UN Doc A/60/40, i (2004), at 30, para. 83(14); Committee on the Elimination of Racial Discrimination, *Concluding Observations: India*, UN Doc A/51/18 (1996), at 51, para. 365; *Siliadin v. France*, 43 EHRR (2005) 16, at paras 143–149. The due diligence standard articulated in *Velásquez Rodríguez* likewise highlights criminal measures. It directs states to exercise due diligence to prevent, investigate, and punish abuses: *Velásquez Rodríguez*, *supra* note 20, at paras 166 and 172.

[212] See *supra* notes 210–211 and accompanying text.

[213] See *supra* note 129 and accompanying text.

[214] See, e.g., App. No. 32967/96, *Calvelli v Italy*, ECtHR (2002), at para. 51.

[215] Treaty and UN bodies regularly direct states to protect against abuses that are especially prevalent: see, e.g., Committee on the Elimination of Discrimination Against Women, *General Recommendation 19*, UN Doc A/47/38 (1992) (hereinafter CEDAW General Recommendation 19), at 1; UN GA Res 65/135, UN Doc A/RES/63/155 (2008) (hereinafter 2008 Violence against Women Resolution); Committee on Economic, Social, and Cultural Rights, *Concluding Observations: Moldova*, UN Doc E/2004/22 (2003), at 49, para. 310.

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In some situations, a state must try to avert[216] or redress[217] even a single instance of abuse. Rather, the scale of abuse is evidence that the state is not doing enough to satisfy its obligation.[218] A state that takes more effective measures may lessen the incidents of abuse. The scale of abuse also affects the kinds of measures the state must take. A state that confronts a widespread problem must respond accordingly – with systemic measures designed to reform the legal or behavioural patterns that contribute to abuse.[219] A state likely acts unreasonably if it does not take such measures.

Finally, the reasonableness inquiry may depend on the state's capacity to restrain the abuser. A state is not absolved of its obligation simply because it lacks effective measures of restraint. The whole point of the obligation is to require states to develop those measures. Most of the practice assumes that states *can* develop such measures.[220] And though states are disparately capable, the practice typically does not differentiate the obligation on that basis.[221] Indeed, some practice appears outright hostile to the idea that the obligation varies depending on each state's capacity to develop effective measures of restraint.[222]

[216] For support under the law on the protection of aliens, see, e.g., *Restatement (Third) Foreign Relations* (1987), s. 711 n. 2B; García-Amador *et al.*, *supra* note 3, at 27. For support under human rights treaty law, see, e.g., Committee on the Elimination of Discrimination against Women, *Communication No. 5/2005: Goekce v. Austria*, UN Doc CEDAW/C/39/D/5/2005 (2007), at para. 12.1.4; *Osman*, *supra* note 95, at para. 116.

[217] See, e.g., *Opuz*, *supra* note 208, at para. 128; *supra* notes 210–211 and accompanying text.

[218] See, e.g., *da Penha v. Brazil*, Case 12.051, Inter-Am. Comm'n HR, Report No. 54/01 (2000), at para. 56 (citing 'a general pattern of negligence and lack of effective action by the State' as evidence that the state did too little); *Opuz*, *supra* note 208, at paras 91–106 and 132 (citing systemic failures for the same); App. No. 37201/06, *Saadi v Italy*, ECtHR (2008) (citing systemic abuses in Tunisia for the same); *Ilaşcu*, *supra* note 123, at paras 28–185, 380–382, and 393–394 (citing systemic abuses in Moldova for the same); but see, e.g., Committee on the Elimination of Discrimination Against Women, *Communication No. 6/2005: Yildirim v. Austria*, UN Doc CEDAW/C/39/D/6/2005 (2007), at para. 12.1.2 (holding Austria responsible without considering the scale of abuse).

[219] See, e.g., *da Penha*, *supra* note 218, at para. 61(4) (varied systemic measures); Human Rights Committee, *Concluding Observations: Zambia*, UN Doc A/51/40, i (1997), at 39, paras 195 and 207 (legislative reform); Committee on the Rights of the Child, *Report of the Eighth Session*, UN Doc CRC/C/38 (1995), at para. 288 (comprehensive strategies, including educational programmes and outreach to religious leaders).

[220] See, e.g., App. No. 71503/01, *Assanidze v. Georgia*, ECtHR (2004), at para. 139 ('There is a presumption of competence').

[221] Most treaties do not expressly differentiate the obligation on the basis of capacity: see the sources cited at *supra* note 5. Moreover, treaty bodies often recommend the same measures to states with vastly disparate capacities. Compare, e.g., Committee on the Elimination of Racial Discrimination, *Concluding Observations: Germany*, UN Doc CERD/C/DEU/CO/18 (2008), at para. 18 (recommending that the state take action 'to prevent and punish perpetrators of racially motivated acts of violence') with, e.g., Committee on the Elimination of Racial Discrimination, *Concluding Observations: Cote d'Ivoire*, UN Doc CERD/C/62/CO/1 (2003), at para. 12 (encouraging the state 'to prevent a repetition of ['racial and xenophobic'] violence and to punish the persons responsible for it').

[222] To the extent that treaty bodies consider claims for differentiation, they tend to be unsympathetic: see, e.g., Human Rights Committee, *Concluding Observations: Algeria*, UN Doc CCPR/C/79/Add.95 (1998), at para. 3 ('a general climate of violence heighten[s] the responsibilities of the State party to re-establish and maintain the conditions necessary for the enjoyment and protection of fundamental rights'); Human Rights Committee, *Concluding Observations: Tanzania* (1992), at para. 5 ('underlin[ing] that [the reduction in resources available for reform] does not exempt the State party from the full and effective application of the Covenant'); *Assanidze*, *supra* note 220, at para. 142 (underscoring 'the need

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Nevertheless, the practice does contain hints of differentiation. For example, decision-makers sometimes relax the obligation when a state's capacity is manifestly impaired. In *Ilaşcu*, the court examined abuses committed in a semi-autonomous region in Moldova.[223] The court recognized that, because Moldova lacked authority in the area, it could not take the measures ordinarily required of states.[224] Although Moldova had an obligation to protect, its measures might reasonably be different from and less effective than the measures of more capable states.[225] Other practice might also permit differentiation. The European Court of Human Rights has defined the obligation by reference to an undue burden: the obligation 'must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities'.[226] The burden of taking particular measures is necessarily relative and inconstant. As James Nickel explains, 'When we ask whether a certain party can bear a burden, we really want to know whether that party can bear that burden without abandoning other responsibilities that ought not be abandoned.'[227] The answer will vary depending on the state's particular resource and other constraints. Indeed, developing states regularly invoke their capacity constraints to excuse a lacklustre performance on human rights.[228]

Thus, differentiation in this context is both subtle and controversial. It should be less so.[229] States are variously capable of restraining third parties and confront disparate challenges to satisfying their obligations to protect. Defining reasonableness

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to maintain equality between the States parties and to ensure the effectiveness of the Convention'). The hostility to differentiation is to some extent understandable, because the idea that human rights are universal suggests that their protection transcends economic, political, and cultural differences: see L. Rajamani, *Differential Treatment in International Environmental Law* (2006), at 20.

[223] *Ilaşcu*, *supra* note 123.

[224] *Ibid.*, at para. 330 (finding that Moldova 'does not exercise authority over part of its territory'); *ibid.*, at para. 333 (finding that Moldova's lack of territorial control 'reduces the scope of [Moldova's] jurisdiction' in the region).

[225] *Ibid.*, at paras 322–352; see also Human Rights Committee, *Concluding Observations: Cyprus*, UN Doc CCPR/C/79/Add.88 (1998), at para. 3 (noting, as one factor affecting Cyprus' implementation, that Cyprus 'is still not in a position to exercise control over all of its territory and consequently cannot ensure the application of the [ICCPR] in areas not under its jurisdiction'); Human Rights Committee, *Concluding Observations: Lebanon*, UN Doc CCPR/C/79/Add.78 (1997), at para. 4 ('The Committee appreciates that the State party is not in a position to ensure that the provisions of the [ICCPR] are effectively applied and respected throughout the territory, since the authorities have no access to the southern part of the country, which remains under Israeli occupation'); but see Committee on the Rights of the Child, *Concluding Observations: Nepal*, UN Doc CRC/C/150 (2005), at 66, para. 293 ('While noting the de facto control by non-state actors of areas of the State party's territory, the Committee emphasizes the full responsibility of the State party').

[226] *Osman*, *supra* note 95, at para. 116.

[227] Nickel, *supra* note 195, at 81.

[228] See E. Brems, *Human Rights: Universality and Diversity* (2001), at 346–349 (reviewing state practice).

[229] On the appeal of differentiated obligations more generally, see, e.g., Reisman, 'Toward a Normative Theory of Differential Responsibility for International Security Functions: Responsibilities of Major Powers', in N. Ando (ed.), *Japan and International Law Past, Present and Future* (1999), at 43; Stone, 'Common But Differentiated Responsibilities in International Law', 98 *AJIL* (2004) 276.

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in part based on capacity would enjoin all states to make concerted efforts to restrain abusers, without requiring them to do that which they genuinely cannot.[230] Further, differentiation would permit each state to focus on its primary areas of concern – on abuses that are especially deep-seated or prevalent – instead of stretching its (inevitably limited) resources too thin.

5 The Framework Applied

Having presented and justified that general framework for decision, this section applies it to two current debates in human rights law: when must a state restrain third parties outside its territory? And what must states do to protect women from private acts of violence? The framework helps resolve those debates by identifying the questions and considerations relevant to assessing state bystander responsibility. This section concludes by suggesting how the same framework may inform obligations that are analogous to obligations to protect but arise outside human rights law.

A *Extraterritorial Obligations*

This article has already identified some scenarios in which a state must restrain abusers outside its territory – namely, where the state has delegated authority to or substantially enabled those abusers.[231] This section amplifies on those points in order to direct one of the most contentious debates in modern human rights law: when do human rights obligations apply extraterritorially? In the legal scholarship, that debate has centered on obligations to respect.[232] Extraterritorial obligations to protect receive little attention in the academic literature but arise repeatedly in practice.[233] In the practice, decision-makers variously assert that the decisive factor for determining whether a state has an extraterritorial obligation to protect is the state's: (1) control

[230] *Cf.* Nickel, *supra* note 192, at 127 ('the obligations flowing from a right will be without effect if their addressees are genuinely unable to comply with them or unable to comply while meeting their higher-ranked responsibilities').

[231] *Supra* sect. 4.A.

[232] For illustrative decisions, see *Israeli Wall Case*, *supra* note 11, at para. 111; App. No. 31821/96, *Issa v. Turkey*, ECtHR (2004), at para. 71. For scholarly discussions, see F. Coomans and M.T. Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (2004); Dennis, 'Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation', 99 *AJIL* (2005) 119; Milanović, *supra* note 81.

[233] See, e.g., *Ilaşcu*, *supra* note 123 (extraterritorial abuses committed by non-state entity affiliated with the state); *Behrami*, *supra* note 83 (by intergovernmental organization); Human Rights Committee, *Concluding Observations: United States*, UN Doc CCPR/C/USA/CO/3/Rev.1 (2006), at para. 16 (by other states); Committee on the Elimination of Racial Discrimination, *Concluding Observations: United States*, UN Doc CERD/C/USA/CO/6 (2008), at para. 30 (by corporate nationals).

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over the rights holder;[234] (2) control over the territory in which the abuse occurs; [235] or (3) influence over the abuser.[236]

The first approach focuses on the state's control over the potential victim: a state must protect from extraterritorial harm persons over whom it has physical control. That approach suggests that states have very limited extraterritorial obligations to protect. States would have such obligations primarily when they transfer someone to another state. The transferring state usually has custody of and therefore control over the victim. In most other contexts, however, states lack physical control over people abused by third parties in other states. Without such control, a state would have no obligation to protect.

The second approach focuses on the state's control over foreign territory (instead of over the potential victim). This approach dominates the practice[237] but has proven inadequate even in decisions that employ it. In *Cyprus*, the test of territorial control was overly broad. The court determined that Turkey's human rights obligations applied in northern Cyprus because Turkey exercised territorial control there.[238] If those obligations applied *because* of Turkey's territorial control, then they presumably applied to all abuses in the relevant territory. Yet the court determined that Turkish responsibility flowed only from the abuses committed by the Turkish Cypriot administration (TRNC), and not from private abuses in the area.[239] The court had difficulty explaining that distinction. Ultimately, it fudged its attribution analysis, justifying its finding by reference to Turkey's close relationship with the TRNC. If that relationship justifies the obligation, then it is unclear why territorial control matters.

The International Court of Justice also applied a test of territorial control in the *Armed Activities* case.[240] In that case the test proved too narrow. The court determined that Uganda had an obligation to protect in portions of the Congo that Uganda occupied.[241] By focusing exclusively on territorial control, the court failed to consider

[234] See, e.g., ICCPR General Comment 31, *supra* note 8, at para. 10 ('a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State party'); *Coard*, *supra* note 123, at para. 37.

[235] See *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)* [2005] ICJ Rep 116, at paras 172–180 (hereinafter *Armed Activities*); *Loizidou*, *supra* note 149, at paras 59–64; *Cyprus*, *supra* note 76, at paras 76–77; Committee on Economic, Social, and Cultural Rights, *Concluding Observations: Israel*, UN Doc E/1999/22 (1999), at paras 232 and 234; see also D. Fleck, *The Handbook of International Humanitarian Law* (2008), at 280 ('The occupying power must also take all measures to protect the inhabitants of occupied territories from violence by third parties'); see also Cerone, 'Human Dignity in the Line of Fire: The Application of International Human Rights Law During Armed Conflict, Occupation, and Peace Operations', 39 *Vanderbilt J Transnat'l L* (2006) 1447, at 1505 (discussing practice).

[236] See *Ilaşcu*, *supra* note 123; *cf.* Committee on Human Rights, *Report of the Special Rapporteur on the Right to Food*, UN Doc E/CN.4/2006/44 (2006) (prepared by Jean Ziegler), at para. 36 (claim that states must protect against the extraterritorial abuses of their corporate nationals).

[237] See the sources cited at *supra* note 235.

[238] *Cyprus*, *supra* note 76, at para. 77; see also *Loizidou*, *supra* note 149, at paras 59–64.

[239] *Cyprus*, *supra* note 76, at paras 80–81, 272, 324, 347–348, and 376 (trying to distinguish and then rejecting claims arising from private abuses).

[240] *Armed Activities*, *supra* note 235.

[241] *Ibid.*, at paras 160 and 176–179.

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seriously whether Uganda should have restrained rebel groups in unoccupied Congo. Yet because Uganda seemed intimately connected with abusive groups throughout Congo, the test of territorial control seems myopic.

The third approach cures some of those deficiencies by focusing on the state's influence over the abuser. In *Ilaşcu*, the court determined that Russian responsibility flowed from the abuses committed by Moldovan separatists in Moldova.[242] The court justified that holding by reference to Russia's 'decisive influence' over the separatists.[243] But here again, the court's reasoning is confused. The court is unclear on why Russian influence matters – whether because it justifies a finding on attribution or triggers the obligation to protect.[244] The court is also unclear on what it means by influence – whether that Russia had the capacity to influence the separatists or that Russia should have exercised its influence.

This framework provides some much needed guidance by focusing on the state's relationship with the abuser. Under this framework, territorial control is relevant but not by itself determinative to the question whether a state has the obligation to protect. A state with complete territorial control generally should maintain order in the area and avoid a vacuum in governance authority.[245] The logic is similar to that which applies in the state's own territory.[246] Thus, the *Armed Activities* court correctly determined that Uganda had to protect people in occupied Congo, because Uganda alone exercised governmental authority there.

The analogy to a state's national territory breaks down when the state shares territorial control with some other entity. In these circumstances, a state may have territorial control but be *discouraged* from exercising the governance authority necessary to restrain abusers. Turkey maintained a military presence in northern Cyprus, but the TRNC exercised most administrative authority. For Turkey to restrain private abusers in the area, it would have had to expand its own governance authority – a move that would undermine the broader interest in an independent and unified Cyprus. As between Turkey and the TRNC, the TRNC should have exercised administrative control, even though Turkey exercised some territorial control. The *Cyprus* court decided the case correctly but without justification.

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[242] *Ilaşcu*, *supra* note 123.

[243] *Ibid.*, at para. 392.

[244] See note 156 and accompanying text.

[245] See *Cyprus*, *supra* note 76, at para. 78 (justifying Turkish obligations in Cyprus partly on the ground that 'any other finding would result in a regrettable vacuum in the system of human rights protection in the territory in question'); *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)* (Advisory Opinion) [1971] ICJ Rep 16, at para. 118 ('The fact that South Africa no longer has any title to administer the Territory does not release it from its obligations and responsibilities under international law towards other States. . . . Physical control of a territory . . . is the basis of State liability for acts affecting other States').

[246] See *infra* sect. 4.A.2.

A similar analysis should have guided *Behrami*. The claimants in *Behrami* argued that French troops in post-conflict Kosovo failed to protect two local children from unexploded ordnance.[247] The French troops were participating in a UN-authorized NATO operation and were not expected to develop complete governance authority in Kosovo.[248] To the contrary, although the NATO force exercised police control, a parallel UN organ (UNMIK) exercised administrative control. The situation is more akin to the one in *Cyprus* than in *Armed Activities*. Further, even if France should have addressed the known, imminent threat posed by the ordnance,[249] the question becomes whether France did enough. Specifically, did France act reasonably in entrusting to the UN all demining activities, or should France have taken unilateral measures to address the threat? Here again, the court may have reached the right result but for the wrong reasons. Yet this more nuanced analysis would enable the court to decide the case without implying that abuses committed by IOs never trigger obligations to protect.

Finally, a state without territorial control may have the obligation to protect, just as a state with territorial control may not. Serbia did not control Bosnian territory in the *Genocide Case*, and Russia did not control Moldovan territory in *Ilaşcu*. Those states had extraterritorial obligations because of their relationships with the abusive external actors. The states substantially enabled those actors to violate rights. Uganda may have had similar relationships with rebel groups operating in unoccupied Congo. Instead of tethering the obligation to territorial control, the *Armed Activities* court should have assessed whether those relationships were sufficiently substantial to trigger the obligation throughout the Congo.

B *Gender-based Violence*

This framework also informs what states must do to protect women from private acts of violence. The obligation to protect has received enormous attention in this context.[250] Gender-based violence regularly causes serious harm and affects women because of their vulnerability. It triggers the obligation to protect. The difficult question is what states must do to satisfy that obligation. Decision-makers commonly assert that states must exercise due diligence to prevent, investigate, and punish gender-based violence in their territories.[251] In the words of the UN Special Rapporteur on Violence against Women, 'the concept of due diligence provides a yardstick to determine whether a

[247] *Behrami*, *supra* note 83.

[248] It was not clear which entity (NATO or France) exercised operational control over the French troops in Kosovo: *ibid.*, at paras 75–79 and 140. If NATO exercised operational control, then any misconduct would be attributable to NATO, and not necessarily to France: see *supra* note 117. In that event, France's relationship to the ordnance would be even more attenuated.

[249] NATO knew about the threat, but it is not clear whether France did: see *ibid.*, at paras 6 and 61.

[250] See, e.g., *da Penha*, *supra* note 218; *Opuz*, *supra* note 208; *A.T.*, *supra* note 6; Cook, *supra* note 18; the sources cited *infra* notes 251 and 276.

[251] See, e.g., Organization of American States, Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, 'Convention of Belém do Pará', 9 June 1994, 1438 UNTS 63, Art. 7(b); 2008 Violence Against Women Resolution, *supra* note 215, at para. 10; CEDAW General Recommendation 19, *supra* note 215, at para. 9.

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State has met or failed to meet its obligations in combating violence against women. However, there remains a lack of clarity concerning its scope and content.'[252] This framework reformulates and amplifies on the due diligence standard. Under it, states must take reasonable measures to restrain perpetrators of gender-based violence.

First, a state that knows or should know of an imminent threat must take reasonable measures to avert the harm.[253] In this context, international expectations have not yet coalesced around specific measures that states must take, perhaps because the measures that are appropriate depend heavily on the circumstances (e.g., the seriousness of the threat, the options for averting the harm, and the extent to which the state must respect the suspect's own rights).[254] The state thus has some discretion to select its own measures.[255] But that discretion is bounded.[256] The state's measures must reflect a concerted effort to restrain the abuser and thereby avert the harm.

Consider some concrete cases. In *Yildirim v. Austria*, the committee established under CEDAW examined whether Austria did enough to protect a woman who was killed by her husband.[257] Austrian officials knew that the husband had threatened and harassed his wife. They responded by issuing restraining orders and filing criminal charges against him. One day, the husband violated his restraining order and fatally stabbed the victim on her way home from work.[258] Austria argued that its measures were reasonable, given the facts: the husband had no criminal history; he had cooperated with police officers investigating the threats; and, as far as Austria knew, he had not previously caused the victim physical harm.[259] The CEDAW committee disagreed. It held Austria responsible for not doing enough – specifically, for not detaining the husband once alerted to his threats.[260] The decision is misguided. On the facts, Austria's measures were well within the bounds of reasonableness.[261]

[252] Ertürk Report, *supra* note 20, at 6.

[253] See *supra* note 216 and accompanying text.

[254] *Cf. Osman*, *supra* note 95, at para. 116 (explaining that the obligation to protect against imminent harms must accommodate 'the difficulties involved in policing modern societies, the unpredictability of human conduct', 'the operational choices which must be made in terms of priorities and resources', and 'the need to ensure that the police exercise their powers to control and prevent the crime in a manner which fully respects the due process and other guarantees which legitimately place restraints on the scope of [state] action').

[255] See, e.g., *Opuz*, *supra* note 208, at para. 165 (acknowledging that states have some discretion to choose 'from among the wide range of possible measures that could be taken' to avert recurring harms).

[256] See, e.g., *Opuz*, *supra* note 208, at para. 170 (determining that the measures taken were 'manifestly inadequate' and 'reveal a lack of efficacy and certain degree of tolerance, and had no noticeable preventive or deterrent effect'); *A.T.*, *supra* note 6, at para. 9.3 (citing the absence of *any* measures for protecting victims from imminent harm).

[257] *Supra* note 218.

[258] *Ibid.*, at paras 2.4–2.13 and 8.4.

[259] *Ibid.*, at paras 4.2–4.5 and 8.14.

[260] *Ibid.*, at paras 12.1.4–12.1.5.

[261] *Cf. Opuz*, *supra* note 208, at paras 138–139 (reviewing practice on when states pursue criminal measures and underscoring that it depends on the seriousness of the offence or extent of the risk).

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Goekce v. Austria is a more difficult call.[262] There, the husband had been physically violent for years. Austrian officials repeatedly intervened in the couple's fights and issued restraining orders against the husband. They also considered prosecuting him, but did not for lack of evidence. Yet they knew that their measures were not entirely effective and that the husband had recently purchased a handgun. Further, they appear not to have responded to an emergency call the victim made the evening before she was killed. The record is unclear on why Austria did not respond to the call or what other measures were available but not taken. The treaty body should have considered those questions to appraise whether Austria did enough to avert the harm. Instead, the treaty body held Austria responsible without seriously assessing the reasonableness of the measures taken.

By contrast, in *Opuz v. Turkey*, the European Court of Human Rights correctly held Turkey responsible as a bystander.[263] The husband had a history of causing his wife and her mother serious bodily harm. Turkish officials responded lackadaisically. Repeatedly, they either did not pursue criminal charges against the husband or required him to pay only a modest fine for past acts of violence. Moreover, even after the husband killed his mother-in-law and continued to threaten his then ex-wife, Turkish officials released him from prison while his appeal was pending. And for years they appear to have taken no protective measures outside the criminal process. Turkey failed to protect the two women from recurring, imminent harms.

Second, once someone has intentionally caused a woman serious bodily harm, the state must investigate the abuse and pursue criminal measures against the abuser. Here, the state's discretion to identify its measures is more constrained. The practice overwhelmingly directs states to investigate and, if possible, prosecute private actors who intentionally cause serious bodily harm.[264] A state may not adopt more lenient measures or fail to implement its criminal measures simply because the victim is female.[265] Criminal sanctions may specifically deter persons who repeatedly commit acts of gender-based violence, as in *Opuz*.[266] They also may signal to other potential abusers that the state does not tolerate such violence.[267]

[262] *Goekce*, *supra* note 216.

[263] *Opuz*, *supra* note 208.

[264] See *supra* notes 210–211 and 251, and accompanying texts. The obligation to take criminal measures assumes a functioning criminal justice system. A state with a criminal justice system so flawed as to render criminal measures ineffective may violate other human rights obligations: see, e.g., *da Penha*, *supra* note 218, at paras 37–44 (dilatory criminal proceedings violate obligation to provide fair trial and judicial protection). However, a state without the capacity to remedy those flaws should have a less onerous obligation to protect: see *supra* notes 220–230 and accompanying text. Note that the obligation to take criminal measures raises questions that are beyond the scope of this article, including whether such measures effectively change or instead reinforce inconsistent cultural norms: see Kahan, 'Gentle Nudges v. Hard Shoves: Solving the Sticky Norms Problem', 67 *Chicago L Rev* (2000) 607.

[265] See, e.g., *González ('Cotton Field') v. Mexico*, Inter-Am. CHR (2009), at paras 150–154, 388–389, and 402; sources cited at *supra* note 251.

[266] *Supra* note 208.

[267] See, e.g., *da Penha, supra* note 218, at para. 56 ('That general and discriminatory judicial ineffectiveness also creates a climate that is conducive to domestic violence, since society sees no evidence of willingness by the State. . .to take effective action to sanction such acts').

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Third, the reasonableness inquiry should focus on the scale of abuse. The prevalence of abuse indicates that the state's measures may be unreasonably lax.[268] In *Opuz*, the court properly considered the prevalence of gender-based violence in Turkey when assessing whether Turkey satisfied its obligation to protect.[269] According to the court, 'the overall unresponsiveness of the judicial system and impunity enjoyed by the aggressors, as found in the instant case, indicated that there was insufficient commitment to take appropriate action to address domestic violence'.[270] By contrast, *Yildirim* and *Goekce* represent missed opportunities. In those cases, the CEDAW committee acknowledged that Austria had developed a comprehensive scheme for combating gender-based violence.[271] Although the petitioners alleged that that scheme was deficient,[272] the CEDAW committee did not assess it or otherwise consider the prevalence of gender-based violence in Austria. The committee's opinions thus do not illuminate whether Austria's measures for combating gender-based violence were, on the whole, reasonable. To the contrary, its recommendations that Austria improve on those measures seem out of place.[273]

Where gender-based violence is widespread, the state must take systemic measures to target the problem.[274] In some instances, such measures will, again, be focused on the criminal law. For example, the *Opuz* court determined that the criminal law in Turkey was insufficient to protect women from gender-based violence.[275] Turkey's legislative scheme actually impeded the state from protecting women because it required victims themselves to pursue criminal complaints. Many women were intimidated into dropping or not filing a complaint, so abuses regularly went unaddressed. In such cases, reforming the criminal law may be an important step toward addressing the causes of gender-based violence. But states with widespread problems should also take varied non-criminal measures. Decision-makers frequently direct states to take such measures, but the measures they recommend tend to be vague and generic: empower women, address structural and cultural causes of violence, promote awareness-raising, and provide gender-sensitive training to relevant officials and professional staff.[276]

[268] See *supra* note 218 and accompanying text.

[269] *Opuz*, *supra* note 208, at paras 192–200; see also *A.T.*, *supra* note 6, at para. 9.3 (lack of 'legal and institutional arrangements' to protect women); *da Penha*, *supra* note 218, at paras 45–50 and 55–56 (systemic failure to enforce criminal law in cases of gender-based violence).

[270] *Opuz*, *supra* note 208, at para. 200.

[271] *Goekce*, *supra* note 216, at para. 12.1.2 ('The Committee notes that the State party has established a comprehensive model to address domestic violence that includes legislation, criminal and civil-law remedies, awareness-raising, education and training, shelters, counselling for victims of violence and work with perpetrators'); *Yildirim*, *supra* note 218, at para. 12.1.2 (same).

[272] *Goekce*, *supra* note 216, at para. 9.10 (allegedly deficient telephone hotline service); *Yildirim*, *supra* note 218, at paras 3.3–3.6 (alleged failures to take seriously cases involving gender-based violence).

[273] *Goekce*, *supra* note 216, at para. 12.3; *Yildirim*, *supra* note 218, at para. 12.3.

[274] See *supra* note 219 and accompanying text.

[275] *Opuz*, *supra* note 208, at paras 137–145.

[276] See, e.g., CEDAW General Recommendation 19, *supra* note 215, at para. 24(a)–(v) (list of recommended measures); Ertürk Report, *supra* note 20, at paras 38–55 and 78–79 (same); see also, e.g., Committee on the Elimination of Discrimination Against Women, *Concluding Observations: Armenia*, UN Doc CEDAW/C/ARM/CO/4/Rev.1 (2009), at para. 23 (training and awareness-raising campaigns).

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Decision-makers should try to specify measures that are better tailored to each state's unique circumstances – considering, for example, the particular kinds of gender-based violence that are especially prevalent in the state (e.g., female genital mutilation, honour killings, or spousal abuse); and the opportunities for and obstacles to effective state intervention. Those factors inform what measures are, in the circumstances of the case, reasonable.

C *Other Regimes?*

This framework covers obligations to protect under human rights law. Analogous obligations exist in other substantive regimes, where those other regimes define the third-party misconduct that states must suppress.[277] The interests that underlie those regimes differ from the ones that motivate human rights law. But because the obligations themselves are fairly similar, this framework may inform what they require. At the very least, this framework offers fruitful areas for further study.

For example, customary law requires states to exercise due diligence to suppress terrorist acts emanating from their territories.[278] Since the 11 September attacks, the UN Security Council has reinvigorated that obligation. The council has directed all states to protect against transnational terrorism and specified the measures that states must take.[279] This framework may help refine that obligation.[280] First, the framework suggests that the obligation should not necessarily be limited to a state's own territory.[281] Rather, the obligation may depend on each state's relationship with the terrorism entity. A state may have to restrain an entity that it once enabled, even if the entity now operates extraterritorially. Second, the framework offers guidance for defining the obligation. In current practice, decision-makers define best measures that all states are expected to take.[282] This framework recommends tailoring those measures for each state, based on the scope of its terrorism problem and, perhaps, its capacity

[277] In addition to the examples discussed in the text, consider the customary obligation to protect against cross-border environmental harm (see Pisillo-Mazzeschi, *supra* note 4, at 36–41), and the obligations to protect diplomatic and consular properties (Convention on Consular Relations, 24 Apr. 1963, 596 UNTS 261, Arts 31 and 40; Convention on Diplomatic Relations, 18 Apr. 1961, 500 UNTS 95, Arts 22 and 29).

[278] See Becker, *supra* note 71, at 119–130 (reviewing practice); Lillich and Paxman, 'State Responsibility for Injuries to Aliens Occasioned by Terrorist Activities', 26 *American University L Rev* (1977) 217, at 251–276 (same).

[279] UNSC Res 1373, UN Doc S/RES/1373 (2001); UNSC Res 1566, UN Doc S/RES/1566 (2004); UNSC Res 1624, UN Doc S/RES/1624 (2005).

[280] *Cf.* Jinks, 'State Responsibility for the Acts of Private Armed Groups', 4 *Chicago J Int'l L* (2003) 83 (encouraging decision-makers to define more clearly state obligations with respect to terrorist activities).

[281] SC Res 1373 indicates that a state has the obligation primarily with respect to terrorists in its territory or of its nationality: UNSC Res 1373, *supra* note 279, at paras 1(b), 1(d), 2(d).

[282] See Johnstone, 'Legislation and Adjudication in the UN Security Council: Bringing Down the Deliberative Deficit', 102 *AJIL* (2008) 275, at 285–286.

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to respond.[283] Such differentiation may help focus each state on its particular areas of concern and options for redress.

Similar obligations appear in international investment law. Many bilateral investment treaties contain 'full protection and security' provisions that require host states to take reasonable measures to protect foreign investments.[284] Investors increasingly invoke those provisions, but international lawyers disagree on precisely what they require.[285] For example, lawyers disagree on which harms trigger the obligation: only harms to physical property[286] or also other kinds of harm.[287] This framework suggests that the proper inquiry is not whether the conduct caused physical damage, but whether the damage – physical or not – is serious. Under that approach, third-party conduct that is especially harmful to an investment may trigger the obligation, even if it causes no physical damage and even if other, less disruptive conduct does not.

Finally, the law of armed conflict requires parties to a conflict to take measures to suppress wartime abuses. Parties to a conflict must 'repress grave breaches, and take measures necessary to suppress all other breaches'.[288] This framework recommends applying that obligation even when the party lacks agency-like control over the abuser. But the framework recommends applying a higher standard of care in agency relationships than in third-party ones. A party to a conflict would be directly responsible only for the grave breaches committed by its members (i.e., agents). It would have to take measures to restrain both its members and associated third parties. Those recommendations address a current gap in the doctrine of superior responsibility. Under that doctrine, a superior officer may be criminally responsible if he does not restrain a subordinate from committing war crimes.[289] The doctrine applies only if the officer

[283] This recommendation raises a different but related question: may a state unilaterally use force in another state, where that other state is manifestly incapable of dealing with its own terrorism problem? That question does not necessarily turn on whether the incapable state satisfied its obligation to protect. In other words, an incapable state may satisfy its (less onerous) obligation to protect but nevertheless face the use of force in its territory. For a review of state practice relating to the use of force against terrorism entities in other states, see Tams, 'The Use of Force against Terrorists', 20 *EJIL* (2009) 359.

[284] See R. Dolzer and M. Stevens, *Bilateral Investment Treaties* (1995), at 60–61; L. Reed, J. Paulsson, and N. Blackaby, *Guide to ICSID Arbitration* (2004), at 49–50.

[285] See Zeitler, 'The Guarantee of "Full Protection and Security" in Investment Treaties Regarding Harm Caused by Private Actors', [2005] 3 *Stockholm Int'l Arb Rev* 1, at 1.

[286] See, e.g., *BG Group v. Argentina*, Award, 27 Dec. 2007 (UNCITRAL Ad Hoc Trib.), at paras 324–328; *Rumeli Telekom v. Kazakhstan*, ICSID Case No. Arb/05/16, Award, 29 July 2008, at paras 666–670.

[287] See, e.g., *National Grid v. Argentina*, Award, 3 Nov. 2008 (UNCITRAL Ad Hoc. Trib.), at paras 187–190; *Biwater Gauff v. Tanzania*, ICSID Case No. Arb/05/22, Award, 24 July 2008, at paras 729–731.

[288] Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and Relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, 1125 UNTS 3, Art. 86; see also *ibid.*, at Art. 87 (providing that parties to a conflict must require commanders to take measures to protect against misconduct).

[289] See Rome Statute of the International Criminal Court, adopted 17 July 1998, 2187 UNTS 3 (July 1, 2002), Art. 28.

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has effective control over the subordinate.[290] It requires nothing of someone who has substantial influence short of control. Requiring agency-like control may make sense for a doctrine of individual criminal responsibility. But international law may assign broader obligations to parties to a conflict than to individual participants. Under this proposal, a party would have to restrain third-party groups with which it associates. The doctrine of superior responsibility need not (but might) also be adjusted to render individual participants criminally responsible, when they fail to restrain abusers over whom they exercise influence short of control.

6 Conclusion

The above framework disciplines the practice on the obligation to protect in light of the dominant trends. Readers may contest one or another facet of the framework, and they may offer alternatives. That dialogue is encouraged, for in addition to persuading readers of the merits of *this* framework, the article has a more modest objective: to begin conceptualizing the obligation in general terms. The same basic principles animate obligations to protect, regardless of context. Those principles and the benchmarks for applying them do not dictate specific outcomes for every obligation-to-protect scenario. But they do provide a framework for decision. In the messy circumstances of any particular case, they focus decision-makers on the considerations relevant to assessing state bystander responsibility.

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[290] See *Prosecutor v. Delalic*, Case No. IT-96-21-A, Judgment (20 Feb. 2001), at para. 266 (finding that command responsibility does not extend to relationships of influence); Osiel, 'The Banality of Good: Aligning Incentives Against Mass Atrocity', 105 *Columbia L Rev* (2005) 1751, at 1783 ('Superior responsibility becomes even less useful where the extent of real control actually diminishes, such as when the relationship becomes one of mutual, though still asymmetrical, influence. . . . Such nuances in power relations elude the doctrine's conceptual crudities, which insist on classifying all parties as either fully controlling or controlled').